INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit insofar as it denied enforcement of the reinstatement provisions of the Board's order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–31) is officially reported at 448 F. 2d 905. The opinion of the Board (App. D, *infra*, pp. 34–83) is reported at 177 NLRB 353.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 32) was entered on September 3, 1971. The

Board's timely petition for rehearing en banc was denied on October 12, 1971 (App. C, *infra*, p. 33). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether employees engaged in an economic strike who are discharged for that activity before they have been permanently replaced and then continue to strike have an unconditional right to be reinstated to their former jobs.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

* * *

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In August 1967, Teamsters and Warehousemen, Local 381 (the "Union"), began an organizing drive among the employees of the approximately ten moving van and storage companies located in the Santa Maria, California area, including International Van Lines

(the "Company") (App. D, *infra*, pp. 36, 54). On September 21, the Union, having obtained authorization cards from five of the Company's six full-time employees,[1] filed a representation petition with the Board's Regional Office. A copy of the petition was sent to the Company (App. D. *infra*, pp. 36, 55–56). Subsequently, the Union held meetings with the employees of the various moving van and storage companies, which resulted in a decision by the employees to strike. The strike began on October 4 with pickets carrying signs bearing legends such as "Unfair to Teamsters Local 381," "No Election. Why," and "No Contract" (App. D, *infra*, pp. 36, 59–60; Tr. 211–212).

That morning, when the president of the Company, Robert McEwan, arrived at the Company's warehouse and saw the pickets, he attempted to persuade his employees to come to work.[2] The employees who were present—including Richard Dicus, Manuel Vasquez, and Salvidor Casillas—refused, stating: "* * * we don't have a contract. We cannot cross the picket line." (App. D, *infra*, pp. 58–60; Tr. 326–327). Robert Vasquez also did not report to work that day because of the picketing (App. D, *infra*, p. 61). Unable to obtain replacements for his employees locally, Robert McEwan arranged with his brother, who operated another moving company—Mercury Van and Storage—

[1] The Company hires additional employees on a casual or part-time basis as its needs warrant (Tr. 53–56). "Tr." refers to the transcript of the testimony, and "G.C. Exh." to the General Counsel's exhibits, in the Board proceeding.

[2] Although the pickets at the warehouse were not employees of the Company, some of the employees were grouped in front of the warehouse (App. D, *infra*, p. 59).

at Oxnard, California, to obtain several employees whom his brother was in the process of laying off (App. D, *infra*, pp. 60–61; Tr. 329–330).

On October 5, five employees who had been laid off by Mercury—Mitchell, Hoffman, Burlington, Contreras, and Cross—worked for the Company (App. D, *infra*, p. 61; Tr. 330, 348–351). They were carried on Mercury's payroll for their work that day, however, and did not appear on the Company's payroll for the remainder of that pay period, which ended on October 11 (App. D, *infra*, . 3, n. 4; Tr. 330–331; G.C. Exh. 10A).[3] Also on October 5, the Company notified employees Manuel and Robert Vasquez and Richard Dicus by telegram that: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced" (App. D, *infra*, pp. 36–3; G.C. Exhs. 2, 3, and 4).

Between October 8 and October 28, Dicus called on McEwan, who was in the hospital, and asked if he was going to have a job, but McEwan refused to commit himself (App. D, *infra*, p. 69; Tr. 78, 333–334). Manuel Vasquez also visited McEwan in the hospital to inquire about going back to work, but he too re-

[3] Thereafter, Contreras appeared on the Company's payroll only for the periods ending October 18 and October 25 and Burlington appeared only for the period ending October 25. Hoffman did not appear on the payroll until the period ending October 25. There is no evidence that Mitchell or Cross performed any further work for the Company (App D, *infra*, p. 37, n. 4; G.C. Exh. 10B.) Robert McEwan continued to operate his business during the strike by hiring from time to time such other men as his needs required (App. D, *infra*, p. 71; Tr. 348–351).

ceived no commitment (App. D, *infra*, p. 70; Tr. 185). Shortly after McEwan left the hospital on October 28, Dicus went to his office and again asked if he was going to have a job. McEwan replied that he did not know and that it was "the principle of the thing" (App. D, *infra*, p. 69; Tr. 78–80).

In the latter part of November, employee Salvidor Casillas went to McEwan's office and told him that he could no longer stay out on strike since, unlike the other men, he did not have a wife who worked. He asked to be placed on an "availability list" (App. D, *infra*, p. 37; Tr. 343–344). He was never called to work (Tr. 344). About December 12, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to President McEwan's office and asked to be reinstated to their former jobs. McEwan replied: "No, I cannot do it, I got men working for me that stuck by me through all this thing, and I just cannot go out there and fire them" (App. D, *infra*, pp. 37–38, 70; Tr. 82–83, 124–125, 183–184). He added: "How would you guys feel if I put you back to work, and two or three weeks from now do the same thing to you?" (*ibid.*).

B. THE BOARD'S DECISION AND ORDER

The Board found that the Company's employees had been engaged in a lawful strike to compel the Company either to agree to a consent election or to grant immediate recognition to the Union (App. D, *infra*, pp. 39–40); that the Company's telegrams of October 5 in effect discharged employees Manuel and Robert Vasquez and Richard Dicus for engaging in the strike;

and that, since these employees had not been permanently replaced at that time, the Company's action violated Section 8(a)(3) and (1) of the National Labor Relations Act (App. D, *infra*, pp. 40–41). The Board also found that the unlawful discharges tended to prolong the strike, thereby converting "what had commenced as an economic walkout into an unfair labor practice strike;" accordingly it held that the Company further violated Section 8(a)(3) and (1) by refusing to reinstate, upon their unconditional applications, the three employees discharged by the telegrams, and Salvidor Casillas (App. D, *infra*, p. 41). The Board ordered the Company to reinstate the four employees and to make them whole, from the date of their unconditional applications for reinstatement, for any loss of pay resulting from the Company's unlawful action (App. D, *infra*, p. 42).[4]

[4] The Board also found that the Company violated Section 8(a)(1) of the Act by threatening its employees with loss of benefits if they chose union representation (App. D, *infra*, pp. 35–36). The court below held that substantial evidence did not support this finding (App. A, *infra*, pp. 16–21), and the Board does not contest that portion of the court's decision here.

Finally, the Board found that a majority of the employees had signed authorization cards and that the Company's unfair labor practices "could only have had the effect of destroying conditions needed for a fair election" and ordered the Company to bargain with the Union upon request (App. D, *infra*, pp. 41–42, 43). The court below did not reach this aspect of the case (App. A, *infra*, p. 31). Accordingly, should this Court grant the Board's petition and reverse the court of appeals' decision with respect to the reinstatement rights of the affected employees, it would be necessary to remand the case to that court for a determination of the propriety of the bargaining order.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's finding that the employees were engaged in a lawful economic strike, and that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Manuel Vasquez, Robert Vasquez, and Richard Dicus for striking and refusing to cross the picket line before these employees had been permanently replaced (App. A, *infra*, pp. 24–25). The court further found that, although Casillas did not receive a telegram, he was discharged for the same reason and under the same circumstances, and thus his discharge similarly violated Section 8(a)(3) and (1) (App. A, *infra*, p. 22). The Court, however, declined to enforce the reinstatement provisions of the Board's order.

In the court's view, the reinstatement provisions were dependent on a finding that the four employees became unfair labor practice strikers at the moment they were discharged. Disagreeing with such a proposition, the court concluded (App. A, *infra*, p. 27):

> * * * The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been dis-

> charged would eliminate the distinction between the economic-striker-reinstatement rule [*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333] and the unfair-labor-practice-strike-reinstatement rule *Mastro Plastics* v. *National Labor Relations Board*, 350 U.S. 270, in cases like this one * * *. [Footnote omitted.]

Accordingly, the court held that the four employees were economic strikers who would not be entitled to reinstatement if the Company could show "legitimate and substantial business justifications" for refusing to reinstate them (App. A, *infra*, p. 28).

The court further noted that, "[w]hile the Board did find that the discharged employees had in fact not been permanently replaced (which we have already said is supported by substantial evidence), the Board did not inquire whether any other 'legitimate and substantial business justification' existed for not reinstating the four employees" (App. A, *infra* p. 28). The court therefore remanded the case to the Board for further findings on the Company's reasons for failing to reinstate the strikers (App. A, *infra*, pp. 28–29). In addition, the court found that the circumstances surrounding the refusal to reinstate Casillas were ambiguous and directed the Board to clarify that matter (App. A, *infra* pp. 29–31).[5]

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[5] The court noted that Casillas, unlike the other three employees, was a "casual" worker, who worked for the Company only when summoned for a specific job. The court concluded that it was unclear whether McEwan declined to restore Casillas to the availability list or, if he had been restored, whether there was work for which he should have been called (App. A, *infra*, pp. 29–30).

REASONS FOR GRANTING THE WRIT

The holding of the court below that the reinstatement rights of economic strikers who are unlawfully discharged are no greater than those of ordinary economic strikers is contrary to settled principles. Moreover, it undermines the firm guarantees which the National Labor Relations Act has heretofore accorded employees who engage in protected strike activity. Corrective action by this Court is thus warranted.

1. Decisions under the Act have consistently distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–347; *National Labor Relation Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2).

It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced constitutes discrimination against,

and interference with, strike activity, in violation of Section 8(a)(3) and (1) of the Act, and the courts of appeals, including the court below, have enforced Board orders requiring the unconditional reinstatement of such strikers. See, *e.g., National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818, enforcing 96 NLRB 1108, 1112; *National Labor Relations Board* v. *Comfort, Inc.* 365 F. 2d 867, 874 (C.A. 8), enforcing 152 NLRB 1074, 1077–1079; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9), enforcing 88 NLRB 1262, 1268; *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890–891 (C.A. 9), enforcing 97 NLRB 1342, 1344; *National Labor Relations Board* v. *Cowles Publishing Co.*, 214 F. 2d 708, 710–711 (C.A. 9), certiorari denied, 348 U.S. 876, enforcing 106 NLRB 801, 802. See also *Bonnar-Vawter, Inc.* v. *National Labor Relations Board*, 289 F. 2d 133 (C.A. 1).

The decision of the court below in this case is directly contrary to these precedents. The court, though finding that economic strikers Richard Dicus, Manuel and Robert Vasquez, and Salvidor Casillas were discharged in violation of Section 8(a)(3) and (1), nonetheless concluded that they were entitled to no more than the qualified reinstatement rights of economic strikers; in the court's view, the "four employees were economic strikers when discharged and must be so treated here" (App. A, *infra*, p. 28). This reasoning, however, overlooks the fact that an employee who has been unlawfully discharged retains

his employee status for purposes of the Act, and is entitled, as a remedy for the unlawful discharge, to unconditional reinstatement with back pay to his former job. See Section 10(c) of the Act, 29 U.S.C. 160(c); *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263. A striker who has been unlawfuly discharged is in no different position and is similarly entitled to unconditional reinstatement. See cases cited in preceding paragraph.

Accordingly, wholly apart from the fact that the four dischargees were strikers, the Company, because of its action in unlawfully discharging them, was under an unconditional obligation to reinstate them. Moreover, since the employees in question continued to strike after their discharge, it follows that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. They were thus entitled to reinstatement unconditionally as unfair labor practice strikers. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928, n. 8 (C.A. 2); *National Labor Relations Board* v. *Frick Co.*, 397 F. 2d 956, 964 (C.A. 3); *General Teamsters Local Union No. 992* v. *National Labor Relations Board*, 427 F. 2d 582, 587 (C.A. D.C.).

2. If permitted to stand, the decision of the court below would not only create uncertainty in an area where heretofore the rules have been relatively clear-cut, but would expose employees who engage in an economic strike to an added, substantial risk of job loss. Under that decision, once the employees have gone out on strike, the employer could discriminator-

ily discharge union leaders or others whom he disfavored and avoid an obligation to reinstate them by later establishing a "business justification" for refusing reinstatement. The employer could not thus minimize his reinstatement obligation by effecting such discharges while the employees were working; to allow him to do so during an economic strike would inevitably limit the employees' willingness to engage in such protected activity. Finally, the decision of the court below results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges. A decision with these serious consequences warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 25,698

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

INTERNATIONAL VAN LINES, RESPONDENT.

[September 3, 1971]

On Petition to Enforce an Order of the National Labor Relations Board,

Before: BARNES, DUNIWAY and TRASK, Circuit Judges

DUNIWAY, Circuit Judge. The National Labor Relations Board petitions for enforcement of its order requiring International Van Lines (the Company) to cease and desist from interfering, in violation of section 8(a)(1) of the National Labor Relations Act (the Act) (29 U.S.C. § 158(a)(1)), with its employees' exercise of their rights under section 7 of the Act (29 U.S.C. § 157) and from discriminatorily discharging employees who favor unionization, in violation of sections 8(a)(1) and 8(a)(3) of the Act (29 U.S.C. §§ 158(a)(1) & (3)), and also requiring the Company to reinstate the discriminatorily discharged employees and to bargain with the Union.[1] We remand

[1] Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

453-839—72——2

the case to the Board for further findings and for modification of its order.

The *dramatis personae* are: Robert L. McEwan, president of the Company and active head of its business, (McEwan; his son, John G. McEwan, a student then approximately 18 years old who worked for the Company during the summer, (Johnny McEwan); Ben H. Sanders, secretary-treasurer of the Union and a prime Union organizer; Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvador Casillas, employees of the Company who were discharged after they refused to cross a picket line thrown around the Company's premises; and David Dicus, a student then about 17 years old, the son of Richard Dicus, and a summer employee of the Company.

The setting was a Union campaign, begun in August 1967, to organize the employees of all the moving and storage firms located in and around Santa Maria, California. There were about 23 such firms; the Company is one.[1] The Company was not part of any employer association or multi-employer bargaining unit. The Union's picketing of the Company, which began on October 4, 1967, formed part of its campaign. Some of the charges of unfair labor practices under section 8(a)(1) arose from alleged actions of the Company before the picketing; other charges grew out of the Company's response to the picketing.

A. CHARGES THAT THE COMPANY THREATENED ITS EMPLOYEES, THEREBY INTERFERING WITH THEIR RIGHT TO ORGANIZE UNDER SECTION 7, IN VIOLATION OF SECTION 8(a)(1).

The gist of these charges is that the Company communicated to some of its employees, using Johnny

[1] A related case is *NLRB v. Coast Delivery Service*, 9 Cir. 1971, 437 F.2d 264.

McEwan as an intermediary, threats of economic reprisal if the employees voted to unionize. Three conversations in which Johnny McEwan participated underlie the charges.

The first conversation occurred about September 1, 1967, while Johnny McEwan, David Dicus, Robert Vasquez, and Jimmy Weaver, another employee of the Company, were unloading a truck at the Company's warehouse. David Dicus testified that Johnny McEwan said "that if the union did come in, that our fishing trips would be gone. We would never have any more, and that is about as good as I can remember on the conversation then." David Dicus could not remember how the conversation arose; Johnny McEwan "came out with that little statement, and I know there was more in the statement, but all I can remember is actually that part. * * * Robert Vasquez testified: "Well, John come in, and he asked us, he heard that we were joining the union, And I said, 'Yes.' Then he said that we should not, that his dad had said if we should join the union, that it is going to take all our benefits and rights, and he was going to work our 'ass.'"

The second conversation occurred around September 15, 1967, in the garage of David Dicus' father-in-law Johnny McEwan and two other men [3] were helping David Dicus sand his car. David Dicus testified: "Well, John had heard the union was—we were trying—things about trying to get a union in, and that is what provoked—I said something about the union has better medical plans. It also gives you a future, and then he come up with a statement, his father

[3] One of the men was David Dicus' brother-in-law, and an employee of the Company. The other was a friend of David's sister-in-law; the record does not state whether he was an employee of the Company.

would handle the situation the same as he did or a friend of his did in Virginia, that he would make it so hard on the workers it would make them want to quit That is the whole conversation right there."

The third conversation occurred about September 29, 1967, at the home of David Dicus. Johnny McEwan visited the Dicus home to say good-bye before leaving for college; in addition to those two, only David's wife was present. David testified that the conversation began when he told Johnny that he had signed a union authorization card "because I wanted to see the rest of the workers get a good break. There is no future in moving, in the moving business, and I wanted to see a future in it." David said that Johnny's reply was "the same conversation that his dad handled it the same way, either he did or his friend did, he would make it so hard on the workers that they would want to quit if the union did come in."

During the cross-examination of David Dicus by counsel for the Company, the following colloquy developed:

> "Q. During these conversations, did Mr. Robert McEwan, Jr. [*sic*] tell you that he was acting for and in behalf of his father?
>
> A. He just told me how his father would handle it. * * * . . .
>
> Q. Did Mr. McEwan or Robert H. McEwan [*sic*] say that my father told me to tell you this and this and this?
>
> A. No sir. He just said that his father would handle this in this manner."

Nothing in the record further illuminates the question whether the parties to the various conversations believed Johnny McEwan to be acting as a representative of his father.

Responding to the General Counsel's argument that Johnny McEwan's remarks in these three conversations were, in effect, coercive statements to employees by the Company, the Trial Examiner stated:

> "These part-time, casual, summer-time employees are involved in this controversy only by the accident of birth and filial loyalty. * * * I do not think this expressed opinion of one college boy to his chum, both of whom are known to the employees as 'helpers' of summer-time duration only, constitute an unfair labor practice [under § 8(a)(1)] on the part of the Company. The General Counsel's claim that this opinion of Johnny McEwan binds the Company, based only on his relationship to his father, is in reality, an admission of just how insubstantial is the General Counsel's case."

Noting that Johnny McEwan's father did not deny making the remarks that Johnny attributed to him, the Board reversed the Examiner's conclusions:

> "Such remarks were uttered on the heels of an inquiry into the union sympathies of the employees and clearly identified Johnny's interest with the interests of his father and [the Company]. * * * [W]e find that Johnny, in making the remarks and attributing them to his father, was acting as a conduit for his father and thereby coerced and interfered with the employee's exercise of their Section 7 rights. Accordingly, we conclude that in these circumstances the remarks uttered by Johnny McEwen violated Section 8(a)(1) of the Act. [footnotes omitted.]"

The Board's opinion to the contrary, it is immaterial whether the senior McEwan actually made the

anti-union remarks attributed to him by his son. What is important is whether the Company communicated anti-union threats to its employees. What McEwan said to members of his family has, by itself, no bearing on that question. It might have bearing if the evidence tended to show that McEwan authorized Johnny to convey his feelings to the employees, or that the employees reasonably believed that Johnny was speaking on behalf of his father, or that Johnny intended to do so.

None of these possibilities is supported by substantial evidence on the record considered as a whole. The record made before the Trial Examiner supports only the Trial Examiner's characterization of the conversations.

The Board cites *NLRB v. Champa Linen Service Company,* 10 Cir., 1963, 324 F.2d 28, and *NLRB v. W. R. Hall Distributor,* 10 Cir., 1965, 341 F.2d 359, for the proposition that an employer's son, himself an employee, may be found to have acted on behalf of his father in making antiunion statements to other employees, and that the statements may constitute an unfair labor practice. Those cases are factually distinguishable. The evidence there tended to show that the sons' activities were in fact undertaken on behalf of their fathers and that the activities went well beyond mere casual conversation. 324 F.2d at 30; 341 F.2d at 362–363. No comparable evidence appears here.

The Board refers us to testimony which, if believed, would establish that the senior McEwan told employee Richard Dicus that the employees would lose certain benefits if the Company were unionized. The Board states, however, that McEwan's statement is not alleged as an independent unfair labor practice, but is only "used to shed light upon the true character

of the Company's other activities." Wherever the statement does shed light, it does not tend to establish that Johnny McEwan's remarks were made on his father's behalf.

B. CHARGES THAT THE COMPANY DISCRIMINATORILY DISCHARGED EMPLOYEES FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY IN VIOLATION OF SECTIONS 8(a)(1) AND 8(a)(3)

On September 21, 1967, the Union petitioned the Board for certification as the exclusive bargaining agent of the Company's employees. At that time five of the Company's employees had signed Union authorization cards, a clear majority of the 6-man appropriate bargaining unit. The Company received a copy of the petition from the Board on September 25, 1967, and awaited further action by the Board. It is undisputed that at no time before October 4, 1967, did the Union demand recognition by the Company; nor did it undertake any other action to notify the Company directly that it wished and was entitled to be the exclusive bargaining agent. The only notification the Company had received came from the Board, not from the Union.

On October 2 and 3 the Union held meetings of the employees of all the moving and storage companies in the Santa Maria area. Ben Sanders, the Union organizer, addressed each meeting. He stated at both meetings that the company had consented to representation elections but had later withdrawn its consent. Sanders also stated that employees of local moving and storage companies other than International Van Lines were being discharged.

The October 3 meeting concluded with a decision to strike all the moving and storage companies the following day. A picket line appeared in front of the

Company's premises on October 4. Picket signs read, "Unfair to Teamsters Union Local 381" and "No elections. Why?" The men on the picket line were not employees of the Company. Some of the Company's employees were present, however, including Richard Dicus, Manuel Vasquez, and Salvador Casillas. All three refused to cross the picket line, and none reported to work the following day. McEwan testified that Robert Vasquez was not present during the picketing, but that McEwan saw Robert Vasquez drive toward the Company's premises and turn around without stopping; other testimony placed Robert Vasquez at the scene of the picketing. It is undisputed that Robert Vasquez did not report to work the next day. On October 5, 1967, Robert and Manuel Vasquez and Richard Dicus received identical telegrams that read as follows: "For failure to report to work as directed at 7 AM on Wednesday morning Oct 4 1967 you are being permanently replaced. [Signed] International Van Lines." Casillas did not receive a telegram, and it is not evident from the record how the fact of his discharge was communicated to him. It is undisputed, however, that he was discharged at about the same time and for the same reasons as the other three men. The reason given by McEwan for the discharges was that "it has been our policy * * * in the past that if a man did not show up for work, why, he was let go. Not for one day, but for two."

The Company had a moving job scheduled for October 4, the day the picketing began. After failing to find men to do that job, McEwan obtained a one-day postponement from the firm for whom the work was to be done. McEwan attempted, unsuccessfully, to secure local men as replacement employees. He then telephoned his brother, president of Mercury Van and Storage Company (Mercury) in Oxnard, California,

and was able to hire three men that Mercury had scheduled for layoff, plus two other men from the Oxnard area. The replacements were carried on Mercury's payroll while the October 5 job was being performed, and the Company reimbursed Mercury for their wages. One of the replacement workers thereafter appeared on the ompany's payroll during the pay period from October 12 through October 18; another for the October 19–25 period; a third for the October 19–25 period and on four of the next five pay periods. The other two replacements never appeared on the Company's payroll.

On these facts, the Board found that the Company violated sections 8(a)(1) and 8(a)(3) of the Act by discharging the four employees. We uphold these findings.

First: The Trial Examiner wholly discredited, as a deliberate fabrication, Sanders' testimony that the Union's counsel had told him that the Company had consented to an election and had then reneged. The Trial Examiner also noted that nothing in the record showed that the Company had ever consented to a representation election, much less withdrawn its consent.

The Board properly regarded these findings of the Trial Examiner as legally irrelevant. Fabrication or not, it is undisputed that Sanders told the men assembled at the Union meeting that the Company had consented to an election and had then reneged. Nothing in the record suggests that the men believed otherwise, or had reason to believe otherwise. There is substantial evidence to support the Board's findings that the strike was motivated by that belief and that the purpose of the strike was to pressure the Company into holding a consent election.

We agree with the Board that "a strike for the purpose of persuading an employer to agree to a consent election is lawful even though a representation petition is pending before the Board." *Philanz Oldsmobile, Inc.*, 1962, 187 N.L.R.B. 867, 869, citing *New Orleans Roosevelt Corp.*, 1961, 132 N.L.R.B. 248, 257–258.[4] That the strikers' belief in the Company's unwillingness was mistaken does not remove their concerted activity from the protection of section 7 of the Act. *NLRB* v. *Phaostron Instrument & Electronic Co.*, 9 Cir. 1965, 344 F.2d 855, 858–859; *NLRB* v. *McCatron*, 9 Cir., 1954, 216 F.2d 212, 215. The work stoppage was a lawful and protected economic strike. *Cf. NLRB* v. *Erie Resistor Corp.*, 1963, 373 U.S. 221, 233–234.

Second: The protection given by the Act to economic strikers differs in scope from that given to participants in an unfair labor practice strike. See *Snow* v. *NLRB*, 9 Cir. 1962, 308 F.2d 687, 694. Economic strikers are not automatically entitled to reinstatement:

> "[A]n employer, guilty of no act denounced by the statute, has . . . the right to protect and continue his business by [filling with replacements] places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the decision of the latter to resume their employment, in order

[4] The Board found, in the alternative, that even if the purpose of the strike was to gain immediate recognition for the Union, rather than merely to force a consent election, the strike was lawful, even absent a prior demand for recognition, since no other union was then certified as a bargaining agent. Citing *Philanz Oldsmobile, Inc.*, 1962, 137 N.L.R.B. 867, 869–870; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 75; *NLRB* v. *Washington Aluminum Co.*, 1962, 370 U.S. 9, 14. We do not pass on this question.

> to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

NLRB v. *Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 345–346. Accord, *NLRB* v. *Fleetwood Trailer Co.*, 1967, 389 U.S. 375, 379. However, the employer is not free to discharge striking employees and *then* to find permanent replacements for them; "the discharge of economic strikers prior . . . to the time their places are filled constitutes an unfair labor practice." *NLRB* v. *Globe Wireless*, 9 Cir., 1951, 193 F.2d 748, 750. Accord, *NLRB* v. *McCatron*, 9 Cir., 1954, 216 F.2d 212, 215; *NLRB* v. *Comfort, Inc.*, 8 Cir., 1966, 365 F.2d 867, 874.

In this case the Board found, and now argues that: (1) The Company did not merely "replace" the four employees—*i.e.*, did not discharge them after hiring replacements in order to be able to continue its business—but rather discharged them "in order to punish [them] for taking part in the strike." And (2) even if the Company did merely replace the four employees, the replacements hired were temporary replacements only, not employees who intended to work for the Company permanently; thus the four employees were discharged before the Company had obtained permanent replacements for them. Both of these findings are supported by substantial evidence on the record as a whole.

We therefore affirm the Board's findings that the Company violated sections 8(a)(1) and 8(a)(3) of the Act by discharging the four employees. *NLRB* v. *McCatron, supra*, 216 F.2d at 214–215; *cf. NLRB* v. *Globe Wireless, supra*, 193 F.2d at 750.

C. CHARGES THAT THE COMPANY REFUSED TO REINSTATE THE DISCHARGED STRIKERS, IN VIOLATION OF SECTIONS 8(a)(1) AND 8(a)(3).

The Board found that "[t]he discharge of the [four] employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walkout into an unfair labor strike. Accordingly, [the Company] further violated Section 8(a)(3) and (1) of the Act by refusing the reinstate, upon their unconditional applications," the four employees. We are unable to accept in full these findings of law and of fact.

Turning first to the questions of law, we momentarily assume for the sake of exposition that all four employees were improperly refused reinstatement. The Board bases its argument in support of the above conclusions on the following principles: Where an employer's unfair labor practice committed during the course of an economic strike is shown to be "a significant factor" in the strike, the burden falls on the employer to show that the strike was not thereby "prolonged or aggravated." If he does not, and the strike is found to have been prolonged or aggravated by the unfair labor practice, the economic strike is converted into an unfair labor practice strike. Citing *General Teamsters & Allied Workers Local Union 992* v. *NLRB,* D. C. Cir. 1970, —— F.2d ——, ----. Unfair labor practice strikers are entitled upon request to reinstatement with back pay, even if the employer has in the meantime hired permanent replacements. See *Mastro Plastics Corp.* v. *NLRB,* 1956, 350 U.S. 270, 278.

Applying these principles to this case, the Board reasons that the Company's unfair labor practice in discharging the four employees was "a significant

factor" in the strike: that the Company did not meet its consequent burden; that the unfair labor practice converted the economic strike into an unfair labor practice strike; and that the four discharged workers are therefore absolutely entitled to reinstatement under the *Mastro Plastics* rule. Implicit in the Board's reasoning, though not explicitly stated, is the assumption that the conversion of the economic strike into an unfair labor practice strike necessarily converted the four discharged economic strikers into unfair labor practice strikers, to whom the *Mastro Plastics* rule properly applies.

That assumption is untenable. The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between [the] economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one.[8] Such a result is unwarranted in law and in reason.

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[8] Elimination of the distinction would follow, strictly speaking, only in those cases where the discharge of economic strikers constitutes "a significant factor" in the prolongation of the strike. The Board argues that "[i]n this case, the Company's unfair labor practices were clearly 'a significant factor' in the strike, since the discharge of economic strikers 'necessarily * * * restrain[s] [employees] from engaging in concerted ac-

Accordingly, we need not determine whether the economic strike was converted into an unfair labor practice strike. The four employees were economic strikers when discharged and must be so treated here. *Cf. NLRB v. Frick Co.*, 3 Cir., 1968, 397 F.2d 956, 964; *Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 6 Cir., 1964, 331 F.2d 720, 729. The strikers are entitled to reinstatement unless the Company can show "legitimate and substantial business justifications" for refusing to reinstate them, one such justification being the unavailability of positions due to the hiring of permanent replacements under the *Mackay* rule, *NLRB v. Fleetwood Trailers Co.*, 1967, 389 U.S. 375, 379.

The Board did not pass on the question whether the discharged employees, if considered as economic strikers rather than as unfair labor practice strikers, were entitled to reinstatement. While the Board did find that the discharged employees had in fact not been permanently replaced (which we have already said is supported by substantial evidence), the Board did not inquire whether any other "legitimate and substantial business justifiction" existed for not reinstating the four employees. The Board has requested, however, if we find the discharged strikers not subject to the unfair-labor-striker-reinstatement rule, that we remand the case to the Board "for further findings

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tivities for their mutual aid and protection * * * '." The Board adduces no evidence in support of this "necessary" effect. Compare *NLRB v. James Thompson & Co.*, 2 Cir., 1953, 208 F.2d 743, 749 (L. Hand, J.). If the discharges in this case so "necessarily" constituted "a significant factor" in prolonging the strike, discharges of economic strikers will be significant factors in prolonging virtually any economic strike.

concerning the Company's reasons for failing to reinstate the strikers." We do so.[8]

We turn now to the questions of fact surrounding the requests for reinstatement. Substantial evidence supports the Board's findings that, on December 12, 1967, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to McEwan's office and unconditionally requested to be reinstated. The Company argues that the requests were in reality conditioned upon the Company's agreeing to sign a contract with the Union. While such a condition is perhaps inferrable from the entire course of events surrounding this dispute, the record shows that the three workers' requests for reinstatement had no conditions expressly attached. It is undisputed that McEwan declined to reinstate the three men.

The situation as to Salvador Casillas is different. Unlike the other three, who were regular employees of the Company, Casillas was a "casual" worker—one who worked for the Company only when summoned by the Company for a specific job. Casillas had been notified to come to work on October 4, the day the strike began; he did not, and was therefore discharged. According to McEwan's testimony, Casillas came to McEwan's office sometime in the latter part of November to request reinstatement. McEwan testified that Casillas "told me he could not stay out on

[8] Strictly speaking, the Board requested us to remand the case if we find that "the strike was not converted into an unfair labor practice strike" but remained an economic strike. The view we take does not require us to answer that question. Our result, however, treats the discharged strikers as economic strikers—exactly as they would be treated had we made the finding upon which the Board predicates its request for a remand. Since the same further findings would be needed in either case, we think the remand is appropriate here.

strike any more . . . and that he had to go back to work and he asked me if he could be put on an availability list of my company." McEwan replied "that I would put him down as jobs come in, that we could use him on things, and why, we would call him." McEwan added that he had not had occasion to summon Casillas for work since then.

McEwan's testimony is all the evidence concerning the question of Casillas' reinstatement. The Board found that Casillas was in fact not reinstated, but it gave no reasons for its conclusion. On this record, we hesitate to accept such a bare finding. It is possible that the Board wholly discredited McEwan's testimony that he would place Casillas on the availability list; it is also possible that the Board accepted that testimony but found that McEwan subsequently declined to summon Casillas even though sufficient work may have been at hand. On the present record, we doubt that substantial evidence exists to support the former; we would be more favorably disposed toward the latter, if the Board could show that McEwan in fact could have used Casillas but chose not to call him. We see no need to resolve the ambiguity ourselves, however. Since we are remanding the case to the Board for other matters, we also direct the Board to determine, on remand, whether McEwan declined to restore Casillas to the availability list or whether Casillas had been restored to the list but had not been called to work; and if the latter, whether there was work for which he should have been called, so that failure to call him amounted to refusal of reinstatement.

We do not now pass on the propriety of the Board's bargaining order in this case. It will be time enough to do so if the case comes before us again on the Board's petition for enforcement.

The case is remanded to the Board for the determinations required by Part C of this opinion and for modification of the Board's order in accordance with Part A of the opinion.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 25698

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES, RESPONDENT

JUDGMENT

Upon Petition to Enforce an Order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from The National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said National Labor Relations Board in this Cause be, and hereby is remanded to the Board for the determinations required by Part C of this opinion and for modification of the Board's Order in accordance with Part A of the opinion.

[Entered September 3, 1971] WM. B. LUCK,
Clerk,

R. D. HEWITT,
Deputy.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 25,698

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES, RESPONDENT

Order

Before: BARNES, DUNIWAY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition of the National Labor Relations Board for a rehearing and to reject its suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

[Entered October 12, 1971]

APPENDIX D

United States of America Before the National Labor Relations Board

INTERNATIONAL VAN LINES

and

TEAMSTERS AND WAREHOUSEMEN, LOCAL 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

DECISION AND ORDER

On November 20, 1968, Trial Examiner David F. Doyle issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in certain unfair labor practices and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision and the exceptions and briefs, and adopts the Trial Examiner's findings, conclusions and recommendations only to the extent consistent herewith.

1. The Trial Examiner found that certain statements made by Johnny McEwan, son of Respondent's president, on several different occasions were not violative of Section 8(a)(1) of the Act. Contrary to the Trial Examiner, and for the reasons detailed hereafter, we find that certain remarks made to employees by Johnny McEwan on company premises were violative of the Act.

David Dicus testified that around September 1[1] while he, Robert Vasquez, and Jimmy Weaver, employees at the warehouse, were unloading a truck, Johnny McEwan said, "if the Union did come in, that our fishing trips would be gone. We would never have any more * * *" Employee Vasquez testified that Johnny came in and "asked us, he heard that we were joining the union." When Vasquez answered in the affirmative, Johnny said that "we should not, that his dad had said if we should join the union, that it [sic] is going to take all our benefits and rights, and he was going to work our * * *" Vasquez' version of this conversation not only supplies the context in which the conversation took place but also attributes the coercive remarks to Johnny's father and Respondent's president, Robert McEwan. The latter did not deny making such remarks to his son.

Such remarks were uttered on the heels of an inquiry into the union sympathies of the employees and clearly identified Johnny's interest with the interests of his father and Respondent.[2] In view of a similar statement made to employee Richard Dicus by

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[1] Unless otherwise indicated, all dates refer to events which occurred in 1967.

[2] For similar reasons, we have excluded from bargaining units the children of individuals who have substantial stock interests in closely held corporations. See *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB No. 81.

Johnny's father,[3] we find that Johnny, in making the remarks and attributing them to his father, was acting as a conduit for his father and thereby coerced and interfered with the employees' exercise of their Section 7 rights. Accordingly, we conclude that in these circumstances the remarks uttered by Johnny McEwan violated Section 8(a)(1) of the Act.

2. The Trial Examiner also found that Respondent did not violate Section 8(a)(3) by discharging and refusing to reinstate striking employees Manuel and Robert Vasquez and Richard Dicus and by refusing to reinstate striking employee Salvidor Casillas. We disagree.

The Union was attempting to organize simultaneously the employees of all or almost all of the van and storage companies in the Santa Maria area, including the Respondent. It is clear that the Union had by September 11 secured authorization cards from a majority of Respondent's employees in an appropriate unit of Respondent's employees but did not make a demand on Respondent for recognition. Instead, the Union filed a representation petition with the Board on September 21 limited to such unit. Union meetings of employees of all the area companies were held on October 2 and 3 and thereafter a strike and picketing commenced at Respondent's premises on October 4. One of the picket signs carried the legend, "Unfair to Teamsters Union Local 381," and underneath, "No elections. Why." On October 5 Respondent sent iden-

[3] Dicus testified that on October 3 Robert McEwan told him, "If the union gets in here, we cannot have fishing trips and picnics and Christmas bonuses." McEwan admitted that he mentioned fishing trips, barbecues, and picnics but testified that these benefits were discussed in connection with the effect unionization would have on Respondent's ability to continue such benefits.

tical telegrams to employees Manuel and Robert Vasquez and Richard Dicus, stating, "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced."

Robert McEwan testified that the strikers had been replaced as of October 5 by Harold Mitchell, Gary Hoffman, Blaine Burlington, Ysmael Contreras, and Don Cross. However, the record shows, and the Trial Examiner found, that these were temporary replacements.[4] Subsequently, the striking employees made requests for reinstatement. Robert McEwan admitted in his testimony that in the latter part of November employee Salvidor Casillas came to his office and told him that he could not stay out on strike like the other men who had wives working and that he had to go back to work. Casillas asked to be placed on an "availability list."[5] Contrary to the Trial Examiner's findings, the record shows further, and we find, that on December 12 Manuel and Robert Vasquez and Rich-

[4] The replacements worked for Respondent on Thursday, October 5. They formerly worked for Robert McEwan's brother at Mercury Van & Storage but were being laid off as of October 5, the end of Mercury's pay period. Although Respondent's pay period began on October 5, the men were carried on Mercury's payroll for the day they worked for Respondent. Indeed, there is no evidence that any of the men worked for Respondent on the remaining days of its pay period which ended October 11 or that Mitchell and Cross performed any further work for Respondent through the pay period ending November 29. Moreover, through the pay period ending November 29, Contreras was carried on Respondent's payroll only for the pay periods ending October 18 and 25. Burlington worked only during the pay period ending October 25, and Hoffman first appeared on Respondent's payroll during the same pay period.

[5] Based on the foregoing testimony, we find that Casillas made an unconditional application for reinstatement in November 1967.

ard Dicus made unconditional offers to return to work but were refused.[6]

The Trial Examiner viewed the General Counsel's evidence as establishing an industrywide strike beginning on October 4 which was allegedly caused by the Union's secretary-treasurer, Ben Sanders, announcing at the October 2 and 3 union meetings that Respondent and other van lines had withdrawn their consent to an election.[7] Sanders also testified that an-

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[6] The Trial Examiner inadvertently refers to the date as December 21.

[7] Principally because there was no foundation established on the record to support the fact that Respondent had even consented to an election, let alone withdrawn such consent, the Trial Examiner discredited this testimony and characterized it as "a fabrication by Sanders to give a semblance of excuse for his arbitrary and precipitate conduct in calling the work stoppage." It appears that the Trial Examiner was persuaded to this conclusion by the testimony of employee Richard Dicus who testified that at the October 3 meeting the van line situation was discussed in general but Respondent was not mentioned by name at any time.

In discrediting Sanders' testimony, the Trial Examiner appears to have focused on the issue whether the Respondent's withdrawal of consent was true or false. The General Counsel took the position at the hearing, as well as in its brief, that the truth or falsity of the assertion was irrelevant, stating that the testimony was being adduced only for the purpose of establishing the basis for the Union's decision to strike. As such testimony would tend to establish an economic motivation for the strike, we find merit in this contention. Moreover, insofar as the Trial Examiner discredits Sanders' testimony on the basis of Dicus' apparent denial that Respondent was mentioned by name at the October 3 meeting, the Trial Examiner leaves the erroneous impression that the General Counsel induced Dicus to modify his testimony through leading questions on redirect examination. The record shows, however, that Dicus testified on cross-examination that he left the meeting early and Respondent's name might have been mentioned after he left. Indeed, Casillas, who did remain until the end of the meeting, corrob-

other reason for the strike was the dismissal of employees from other companies.[8]

While the record evidence supports a finding that one of the objects of the strike was to bring pressure on Respondent to agree to a consent election,[9] we need not predicate our disagreement with the Trial Examiner's conclusions on such evidence. For even accepting the Trial Examiner's premise that the strike was at best aimed at seeking immediate recognition of the Union, a finding which is clearly supported by the record, there is nothing unlawful or against public policy in employees striking for such purpose when

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orated Sanders' testimony that there was discussion concerning the withdrawal of consent to an election by three van lines, including Respondent, and that this news precipitated the strike. Casillas testified "we just decided, well, they don't want to consent to an election. We are going to go on strike, and we all started making picket signs that night." This testimony is consistent with the admitted fact that an industrywide strike occurred on the following day and with the "No elections. Why." legend that appeared on one of the picket signs.

[8] The Trial Examiner restricted the evidence to events which pertained only to Respondent, notwithstanding evidence tending to show that decisions at the union meetings were made by and for employees of *all* the van and storage companies. Indeed, the General Counsel's rejected offer of proof indicates that the strike and picketing began on September 27 at the premises of another employer, Coast Delivery Service, because it had allegedly discharged employees for union activity, and that the decision to strike this employer and any other employer who similarly discharged employees for union activity was made at a general union meeting on September 26. While the exclusion of this background evidence was not helpful in developing a well-rounded record, we conclude its exclusion was not prejudicial.

[9] A strike to bring pressure on an employer to agree to a consent election is not unlawful or against public policy. *New Orleans Roosevelt Corp.*, 132 NLRB 248; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 869.

no other union has been certified.[10] Moreover, the strike does not lose the protection of the Act merely because the Union did not present beforehand a specific demand upon the Respondent for recognition. The Supreme Court has stated unequivocally that the language of Section 7 is "broad enough to protect concerted activities whether they take place before, after, or at the same time" a demand is made.[11] Nor are we here concerned with the reasonableness of or the justification for the decision to strike. It is settled law that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as a protected activity.[12] Accordingly, we conclude that on and after October 4, Respondent's employees were economic strikers who retained their status as employees until such time as they were permanently replaced.

We turn now to a consideration of the legal effect on the status of the strikers of Respondent's telegrams of October 5.[13] While these wires are couched in language indicating that the three employees to whom they were addressed were being permanently replaced, their clear import is that they were being discharged for not working; i.e., for engaging in a strike. Moreover, as found by the Trial Examiner, at the time the wires were sent only temporary replacements had been hired. Indeed, the Respondent neither contended nor does the record show that the strikers were re-

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[10] *Philanz Oldsmobile, Inc., supra* at 869.

[11] *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S 9, 14 However, prior to striking the Union had, as previously indicated, filed a petition limited to Respondent's employees and copies of such petition had been served upon the Respondent's which thus knew the Union claimed to represent its employees.

[12] *N.L.R.B.* v. *MacKay Radio and Telegraph Co., Inc.*, 304 U.S. 333, 344.

[13] As the Trial Examiner found that the strike was unprotected, he did not reach this issue.

placed by new employees other than those whom the Trial Examiner found to be temporary replacements. In these circumstances, we conclude that Respondent, by sending these wires, intended to and did discharge employees Manuel and Robert Vasquez and Richard Dicus for engaging in a strike and thereby violated Section 8(a)(3) and (1) of the Act.

The discharge of the aforesaid employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walkout into an unfair labor practice strike.[14] Accordingly, Respondent further violated Section 8(a)(3) and (1) of the Act by refusing to reinstate, upon their unconditional applications, Salvidor Casillas, Manuel and Robert Vasquez, and Richard Dicus.

3. The General Counsel contends that the Union represented a majority of Respondent's employees in an appropriate unit, and we agree that a unit of all of Respondent's employees with the usual exclusions is an appropriate unit.[15] The record shows that on September 21, the date the Union filed its petition for representation with the Board, the unit consisted of six full-time and part-time employees who were eligible to select a collective-bargaining representative.[16]

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[14] *Coast Radio Broadcasting Corporation d/b/a Radio Station KPOL*, 166 NLRB No. 72.

[15] As Respondent's business is seasonal and a number of part-time employees are hired in the peak season (July-September), all regular part-time employees who worked or will work a minimum of 15 days in the 3-month period from July to September are includible in the unit. *Motor Transport Labor Relations, Inc.*, 139 NLRB 70.

[16] Included in the unit were Richard and David Dicus, Manuel and Robert Vasquez, Jimmy Weaver, and David Poncetta. Johnny McEwan is excluded from the unit because he is the son of Respondent's president and the Respondent is a closely held corporation. *Foam Rubber City #2 of Florida, d/b/a Scandia, supra.*

As found by the Trial Examiner, all of these employees except Weaver had signed authorization cards by September 11. Although Poncetta was apparently discharged for cause on October 2, we find that the Union still represented a majority of Respondent's employees when Respondent discharged three union adherents on October 5.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having also found that the Respondent unlawfully discharged employees Manuel and Robert Vasquez and Richard Dicus and that the striking employees became unfair labor practice strikers, we shall order the Respondent to reinstate, or offer immediate and full reinstatement to, Manuel and Robert Vasquez, Richard Dicus, and Salvidor Casillas to their prestrike or substantially equivalent jobs with all of the rights and benefits they would have accumulated but for the discrimination against them, discharging, if necessary, any strike replacements. The Respondent shall also be required to make whole the above-named employees for any losses they may have suffered as a result of the Company's failure to reinstate them beginning 5 days after their unconditional applications for reinstatement and continuing until the date of their reinstatement. As the record does not clearly establish whether Salvidor Casillas was a full-time or part-time employee, resolution of his status and his concommitant benefits under this decision will be deferred to the compliance stage of this proceeding.

Any backpay due will be determined in accordance with the formula set forth in *F. W. Woolworth Co.*,

90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Having concluded that Respondent, by discharging Manuel and Robert Vasquez and Richard Dicus on October 5, engaged in unfair labor practices violative of Section 8(a)(3) and (1), we are further persuaded that such conduct demonstrates that Respondent had completely rejected the collective-bargaining principle and its violations could only have had the effect of destroying conditions needed for a fair election.[17] As the Union did represent a majority of the employees in an appropriate unit prior to the discriminatory discharges, we conclude that only a bargaining order can adequately restore as nearly as possible the situation which would have existed but for the Respondent's unfair labor practices.[18] Accordingly, we shall order Respondent, upon request, to bargain with the Union in the unit herein found appropriate.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union has been at all material times the statutory bargaining representative of Respondent's employees in the following appropriate unit for collective bargaining: all full-time employees and all regular part-time employees employed at the Employ-

[17] *The Maxwell Company*, 164 NLRB No. 97.

[18] While the Union made no formal demand on Respondent for recognition, such a demand is not a prerequisite to our granting a bargaining order in these circumstances. *Western Aluminum of Oregon Incorporated, et al.*, 144 NLRB 1191, 1192; *L. B. Foster Company*, 168 NLRB No. 15.

er's Santa Maria, California, operations, excluding office clerical employees, guards, and supervisors as defined in the Act.

4. By discharging Manuel and Robert Vasquez and Richard Dicus because they participated in the October 4, 1967, strike, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The strike which commenced as an economic strike on October 4, 1967, was prolonged by the Company's unfair labor practices, and was converted on October 5, 1967, into an unfair labor practice strike.

6. By refusing to reinstate Salvidor Casillas, Manuel and Robert Vasquez, and Richard Dicus, after their unconditional application, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By threatening employees with reprisals and loss of benefits if they should join the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not violated the Act in respects not found herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Van Lines, Santa Maria, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals and loss of benefits if they should join a union.

(b) Discouraging membership in Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or in any other labor organization, by discharging or in any other manner discriminating against strikers in regard to hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form labor organizations, to join or assist Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive bargaining representative of all its employees in the aforesaid appropriate unit,[19] with respect

[19] Described in paragraph number 3 of the Conclusions of Law.

to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvidor Casillas immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired subsequent to the discharges of October 5, 1967.

(c) Make whole Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvidor Casillas for any losses they may have suffered because of the discrimination against them, in the manner set forth in the section herein entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due and the rights of reinstatement under the terms of this Order.

(e) Notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its offices in Santa Maria, California, copies of the attached notice marked

"Appendix."[20] Copies of such notice, on forms provided by the Regional Director for Region 31, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It is further ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C., June 30, 1969.

GERALD A. BROWN,
Member,
HOWARD JENKINS, JR.,
Member,
SAM ZAGORIA,
Member,
(Seal) *National Labor Relations Board.*

[20] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not threaten our employees with reprisals and loss of benefits if they should join a union.

We will not discourage membership in Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or in any other labor organization, by discriminating in any manner against employees because they strike or engage in any activity protected by the National Labor Relations Act.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent permitted by the provisos in Section 8(a)(3) of the Act.

We Will, upon request, bargain collectively with Teamsters and Warehousemen, Local 381, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen, And Helpers Of America, as the exclusive representative of all employees in the appropriate unit described below and embody all understandings reached in a signed agreement. The appropriate unit is:

All full-time employees and all regular part-time employees employed at our Santa Maria, California, operations, excluding office clerical employees, guards, and supervisors as defined in the Act.

We Will offer to Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvidor Casillas immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired after the discharges of October 5, 1967.

We Will make whole Manuel Vasquez, Robert Vasquez, Richard Discus, and Salvidor Casillas for any losses they may have suffered because of the discrimination against them.

We Will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

International Van Lines
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Bartlett Building, 215 West 7th St., Los Angeles, California 90014, Telephone 213–688–5801.

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

INTERNATIONAL VAN LINES

and

TEAMSTERS AND WAREHOUSEMEN, LOCAL 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

David F. Doyle, Trial Examiner: This proceeding, with the parties represented by the persons named above, was heard by the Trial Examiner at Santa Maria, California on April 3, 4, 11, 1968, on complaint of the General Counsel and answer of the Respondent.[1]

[1] In this Decision International Van Lines is referred to as the Company or the Respondent; Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the Union; the General Counsel of the Board and his representative at the hearing as the General Counsel; the National Labor Relations Board as the Board; and the Labor Management Relations Act, as amended, as the Act.

The complaint dated November 29, 1967 was based on a charge filed by the Union on October 12, 1967.[2] The complaint alleged in substance that the Company had violated Sections 8(a)(1) and (3) of the Act by (1) the discriminatory discharge of four employees named, Sal Casillas, Richard L. Dicus, Manuel Vasquez, Sr., and Robert Vasquez because they had engaged in protected Union activities and (2) by certain coercive conduct of Company supervisors which is described hereinafter.

In its duly filed answer the Company denied the commission of any unfair labor practices but admitted certain allegations concerning the nature of the Company's business and the Union.

At the hearing, counsel for the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record and to file briefs and proposed findings. The General Counsel and counsel for the Company have filed briefs which have been carefully considered.

Upon the entire record in the case and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The pleadings and a stipulation of the parties at the hearing establish that the Company is a California corporation with a warehouse in Santa Maria, California. The Company is engaged in the transportation of household goods by motor vehicle. During the past year the Company in the course and conduct of

[2] All dates in this Decision are in the year 1967 unless specified otherwise.

its trucking operations within the State of California derived gross income in excess of $50,000 from operations performed pursuant to contracts or arrangements with Republic Van Lines, and other corporations which engage in the interstate transportation of household goods.

During the year prior to the issuance of the complaint Republic Van Lines, derived revenues valued in excess of $50,000 for and from the transportation of household goods in interstate commerce between the different states of the United States.

It is found, therefore, that the Company at all times material herein has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings and a stipulation of the parties at the hearing establish and I find, that the Union at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Issues

At the hearing the General Counsel claimed (1) that the evidence established that the Union began an organizational campaign among the Company's employees and that because of the Company's unfair labor practices the employees of the Company engaged in an unfair labor practice strike, during which the four employees named above were discharged because they engaged in the said strike and other protected union activities. The General Counsel claimed that the alleged discharges were designed to undermine the

Union and to destroy its majority in an appropriate unit.

He also contended (2) that the Company had violated Section 8(a)(1) of the Act by (a) threatening its employees with loss of economic benefits or detrimental reprisals, if they assisted the Union, and (b) by interrogating employees concerning their Union membership and activities, and (c) by creating the impression that the Company kept the Union activities of the employees under surveillance.

The Company at the hearing contended that the strike of employees which occurred on October 4, 1967, was not an economic strike; that it occurred without notice or warning and without prior demand for recognition made by the Union upon the Company; and that the strike was neither caused nor prolonged by any unfair labor practices on the part of the Company and that the named employees were lawfully replaced in the course of the work stoppage. The Company denied that any of its officers had committed any acts which attempted to interfere, restrain or coerce its employees.

Undisputed Facts in Background of Controversy

As noted previously, the Company engages in the business of moving household goods by motor van. Its place of business is located in Santa Maria, California, and a large portion of its moving business is derived from the movement of personnel, both civilian and military, into and out of Vandenberg Air Force Base which is in the area.

The Company is a corporation with its stock owned by two brothers; Robert L. McEwan owns 30 percent of the stock, is the Company president and the active head of the business at Santa Maria, John R. McEwan, Jr., owns 70 percent of the stock, but has his

own business in Southern California and did not participate in the direct events of this controversy or testify.

Two other McEwans participated in these events, one is the father of the owner-stockholders, by name, John R. McEwan, Sr., and the other is the son of Robert L. McEwan, by name, John G. McEwan.

It is alleged in the complaint that John G. McEwan who is approximately 17–18 years of age and is a divinity student attending a seminary at Concordia, Missouri and who worked during the summer for the Company committed unfair labor practices. In order that this boy may not be confused with his elders, he will be referred to herein as "Johnny McEwan."

It is undisputed that the Company bought its business as a going concern from one, A. J. Smith, in July 1967, and during that month John R. McEwan, Jr., took over its active control.

It is likewise undisputed that around the last of August, 1967, the Union began an organizing campaign among the employees of *all* the *van* and *storage companies* located in and around Santa Maria, California. This organizational campaign was directed by Ben H. Sanders, the secretary-treasurer of the Union, who testified in the proceeding. It is conceded by the counsel for all parties that the organizational activity of the Union extended to approximately 23 individual companies who were owned by ten or 11 separate employers. It is likewise conceded that the Company is a *single* employer and that the Company is not a member of any employers association of moving companies, van lines or other employers. Indeed, it is conceded that in the Santa Maria area no group or association of van-line employers exists. It is likewise undisputed and conceded that while the Union's

organizational activities were directed to numerous employers, each employer was organized as a single employer unit and when the Union sought certification of representatives, it sought certification for the employees of single employers; thus, when the Union filed a petition for certification in Case No. 31–RC–666 on September 21, 1967, it named this employer as International Van Lines and asked for certification of a unit composed of, all truck drivers, packers, traders, order filers, checkers, warehousemen, leaders, and helpers, etc., of the Company at its Santa Maria, California location. The petition stated that the Company employed five men in the appropriate unit which the Union proposed.

The Organizational Efforts of the Union As Regards the Company

It is undisputed that in the course of its general campaign in the Santa Maria area the Union experienced some success in recruiting membership from the employees of the Company. Of the Company's personnel Richard L. Dicus, Robert Vasquez, and Manuel A. Vasquez, and David Dicus signed authorization cards for the Union on August 23, and David Ponceta signed an authorization card on September 11.

On September 21, George A. Pappy, Esq., of the law firm of Brundage and Hackler as attorney for the Union filed a petition with the 31st Region of the Board (Los Angeles, California) requesting certification of representative in the appropriate unit of the Company's employees at Santa Maria, California. This petition stated that the number of employees was five, and that the Union represented more than 30 percent of the employees in the proposed unit.

The Strike Without Demand for Recognition Without Notice to the Company, and while Board Action was Pending

The petition filed on Thursday, September 21, was transmitted by the Regional Office by regular mail from Los Angeles and received by the Company on September 25, the following Monday. The strike of the employees of the Company and *all other van lines* in the area occurred on October 4, some nine days later. It is undisputed that although the Union had secured authorization cards of four employees on August 23, and of a fifth employee on September 11, it had *not* prior to the date of the strike, demanded recognition of the Company or told the Company that it claimed to represent the Company's employees, or offered to the Company to prove its majority by a showing of authorization cards to either Company officials or to a third party who might determine their authenticity; nor did the Union check the cards against any payroll of the Company or request the Company to provide any payroll records for the purpose of verifying its claimed majority.

Thus, the only claim of majority status or request for recognition transmitted to the Company is that contained inferentially in the transmittal of a copy of the Union's petition from the Board to the Company, with the Board's notice that a representation proceeding had been instituted.

Thus, having received notice from the Board of the pending proceeding the Company awaited action by the Board. With this the prevailing state of affairs, the Union struck the Company and all other van lines in Santa Maria on October 4.

The Undisputed Cause of the Work Stoppage

Ben H. Sanders, secretary-treasurer of the Union testified as to the Union's reasons for striking the Company. Called as a witness by the General Counsel, he testified that a meeting was held of *all* employees of *all* the van lines in the Santa Maria area on October 2. Sanders testified that he announced to the "members attending the meeting that some companies, including International Van Lines, had withdrawn their consent to an election, and we were going to have time—wanted to have time to check it out to make sure that it was right." It was then agreed by union adherents present that another meeting would be held the next evening. At this meeting, Sanders, "announced to the employees attending the meeting that we had checked with our legal counsel and found that International Van Lines and other van lines that we had filed elections on and the companies that had consented to an election had withdrawn their consent for an election."

In the discussion that followed, it was decided to strike International Van Lines and all other van lines.

On cross-examination, Sanders admitted that he did not know, if any documents consenting to an election had been filed with the Board by the Company; nor had he any knowledge that the Company had consented to an election either verbally or in writing. Sanders said that he had called union counsel in Los Angeles, who told Sanders that he (counsel) had called the Regional Office of the Board and *someone there* had told him (counsel) that some person had gone to the Regional Office and "withdrawn all the consents to the elections on the three petitions that had been filed."

It should be noted at this point that the General Counsel failed to prove in this entire case that (1) any written or verbal, formal or informal consent to election, was ever given by the Company to the Union or to the Board or (2) ever withdrawn by the Company. Undisputed evidence offered by the Company is to the effect that no consent was ever given and no consent was ever withdrawn. As stated previously, at this point in time the Company was awaiting action by the Board on the Union's pending representation proceeding.

On redirect examination, the General Counsel asked Sanders if the erroneous "withdrawal of consent" was the only reason for placing pickets at International Van Lines. In answer Sanders said, "The other reason, *other employees* from *other* companies were being dismissed."

On the morning following the second meeting the Union picketed the premises of the Company and all other van lines in the Santa Maria area.

Richard Dicus, one of the union adherents who was called as a witness for the General Counsel testified that when he arrived at the Company's warehouse on October 4 he was surprised to see pickets patrolling in front of the place. He did not know these men; they were not employees of the Company, but he thought they were employees of some other van line in the area. Meador, the office manager of the Company came to the office door at that point and Dicus asked him, "What goes here?" Meador replied that he didn't know, and went back into the office. A few minutes later Robert McEwan drove up to the office and went inside. In a moment or two he came out with a cup of coffee in his hand and Dicus said to him, "Where is your union contract?" McEwan said that he had not seen a union contract. Then Dicus said

that the men had been told at the union meeting and by the pickets that the Company's consent to an election had been withdrawn, and all that the men wanted was a chance to vote for it or against the Union. McEwan replied that he had not withdrawn any consent to any election and looked very surprised. Dicus then suggested that if he were permitted to call the union office that the Union would send a contract over to McEwan in about 10 minutes. At that point McEwan replied, "Hell, no. I'm not signing anything," and went back into the office. Later in his testimony, Dicus stated most positively several times that at the meeting on the evening of October 3, the persons at the meeting discussed the van line situation in *general* but did not mention International Van Lines by name at any time. However, on redirect after some prompting by leading questions, Dicus explained that he left the meeting early and International Van Lines *might* have been mentioned at the meeting after he left.

Dicus said that on the morning of October 4 when he arrived at the picket line, the picketing was being conducted by two men with whom he was not acquainted. Present at approximately this time were employees Manual Vasquez, Sal Casillas, Robert Vasquez, and some other men with whom he was not acquainted. He explained that the Company had a large movement of office equipment planned for that day, so there were additional, casual workers ordered for this large office move.

It was stipulated by counsel for the parties that the picket signs carried by the men had at the top the word "Picket" and on the next line "Unfair to Teamsters Union Local 381." In addition to this uniform top portion of the picket sign, one picket sign had the added slogan, "No elections. Why." Another sign had the added slogan, "No contract." Another had the

added slogan, "Big money for attorneys nothing for us."

Robert L. McEwan, president and general manager of the Company, testified that on October 4, he recieved a phone call from Meador, the office manager, at approximately 6:45 a.m. Meador told him there were pickets out in front of their office and asked him to come right over. He was dressing at the time so hurried and arrived over at the office and asked Meador what it was all about. Meador said that he didn't know anything about it, so McEwen went out to talk to the pickets. At that time in the group there were four men present, who were known to him. They were Richard Dicus, Manuel Vasquez, Sal Casillas, and Robert Allen. He went across the street to the men and said, "We have a job to do. Are you going to go to work?" They said, "No, we don't have a contract. We cannot cross the picket line." He replied that he did not see how he could sign a contract when he had never been presented with one. One of the men asked, if he wanted them to get a contract and he replied, "Not at this time." He went back to his office and phoned the Federal Electric Company for whom his Company was to perform a big office move [illegible] job that day. He explained his situation to Mr. Castle of Federal Electric Company and asked if he could have a day's delay in making the move. Castle replied that under the circumstances his company would be satisfied if the movement of their office was made on the following day.

The Strikers are Replaced

McEwan testified without contradiction that having arranged the postponement with Federal Electric Company Meador and McEwan then tried to locate men locally to replace the strikers, so that the move

could be performed the next day. When they were unsuccessful in finding replacements from local sources, McEwan called his brother John R. McEwan, Jr., at Oxnard, California, and explained his plight to him. John said that under the circumstances he had some men that he thought he could make available to the Company. On the following morning, his brother supplied to him five men named Harold Mitchell, Gary Hoffman, Blaine Burlington and Ysmael (Easy) Contreras and Dan Cross. With the assistance of these men the Company was able to complete the move of the Federal Electric Company.

On October 5, the Company sent identical telegrams to Vasquez, Dicus, and Robert Vasquez, stating, "For failure to report for work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced." McEwan explained that the first employment of the men sent to him by his brother did not appear on the payroll records of the Company because he agreed with his brother to reimburse the brother for the time the men worked for him and for which the brother paid these men. In addition to the men obtained through his brother McEwan was able to hire other men to work for him from time to time as his business required. The Company was able to continue its operations in that fashion and the picketing was continuing at the time of the hearing herein.

Robert L. McEwan's Illness

It is undisputed that on April 8, 4 days after the work stoppage, Robert L. McEwan was hospitalized at Santa Maria for major surgery. He continued in the hospital until October 28 when he was discharged and went to Oxnard, California, for a period of approximately 1 week, to his mother's home for a

further period of convalescence. During the period that he was hospitalized and inactive his father, John R, McEwan, Sr., came to Santa Maria and gave what assistance he could to the business operations of the Company.

The Alleged Interference, Restraint and Coercion

The fact that there are four members of the McEwan family, involved in the events of this proceeding, to either a less or more extent, occasioned some confusion among McEwans at the hearing and it appears that the draftsman of the complaint in certain particulars mixed up these persons. At the hearing counsel for the General Counsel stated that the John R. McEwan, Jr., alleged to be an officer of the Company in paragraph V of the complaint, was not John G. McEwan (herein previously designated as Johnny McEwan) the son of Robert L. McEwan. After this statement without objection paragraph XII(a) was amended to read "by John G. McEwan" instead of "By John McEwan, Jr." This clarification eliminated from any allegations of coercive conduct, John McEwan, Jr., the officer of the Company who lives at Oxnard, California, and did not appear in the events taken place at Santa Maria, and John R. McEwan, Sr., who was a stand in for his son for a few weeks in the course of his son's hospitalization and convalescence and who testified most briefly in this proceeding. John R. McEwan, Sr., appeared on the witness stand only long enough to say that he never discussed union activities with any of the employees while he was at Santa Maria.

David Dicus, the son of Richard Dicus is the principal witness to the alleged unfair labor practices committed by Johnny McEwan. David Dicus is a young man who is a student at California Polytechnic

Institute, San Luis Obispo. Employee Robert Vasquez corroborated to some extent some of the testimony of David Dicus. It was during the cross-examination of Robert Vasquez, that it appeared that there had been a case of mistaken identity as to the McEwan who had held certain conversations with David Dicus. In the course of that cross-examination Vasquez said that the McEwan who had talked to him and Dicus was the son of Robert L. McEwan, a young man 16–17 years of age.

The testimony of David Dicus further clarified this by Smith, the former owner, he had a summer job as part-time employee with the Company. When David was asked what Johnny McEwan's position with the Company was, he said that Johnny was a "swamper, just like I was a swamper being a helper". David testified that in the first conversation that took place around September 1 that he was unloading a truck with Robert Vasquez and Jimmy Weaver, employees at the warehouse. David said that he did not know what lead up to the conversation but his testimony is as follows: Johnny said, "that if the Union did come in, that our fishing trips would be gone. We would never have any more, and that is about as good as I can remember on the conversation then." David said he did not know what provoked this conversation but, "John came out with that little statement, * * *"

David further testified that some three weeks later Johnny came to David's trailer-home to say good-bye to David because Johnny was going back to college in Missouri, and to help David sand an automobile which David owned preparatory to it being painted. While they were so engaged, the conversation veered to the subject of the Union. David said "something about the Union had "better medical plans." At that point Johnny "come up with a statement, his father

would handle the situation the same as he did or a friend of his did, in Virginia, that he would make it so hard on the workers it would make them want to quit. That is the whole conversation right there." In the course of further examination by the Trial Examiner David testified that this conversation arose while the boys were sanding David's car which "John's grandfather was going to paint" for David. The complaint alleges by three separate paragraphs that on October 2, Robert L. McEwan interrogated employees, threatened them with loss of economic benefits or reprisals because of union activity and promised employees promotions to supervisory positions if they refrained from becoming or remaining members of the Union.

In support of these allegations the General Counsel called as a witness Manuel Vasquez, an employee. Vasquez testified that about a week prior to October 4, he had a conversation with Robert L. McEwan in the warehouse of the Company. As to this conversation Vasquez testified as follows:

> A. I was looking in the—some overseas shipment I was working, and Mr. McEwan walked up to me and asked me if I knew anything about this union business that was going on.
>
> Q. Yes?
>
> A. And told him that I did, and he asked me, "Well, are you going—are you fellows going to join?" I told him, "Yes", that I think we would. Well, it was not exactly the words he said, "Are you going to go along with it?" I told him, "Yes", I thought we would, and what did I mean by we would. And I told him that most of the guys working in the warehouse, that worked with me in the warehouse, employees of International and——

TRIAL EXAMINER: Go right along, what else was said?

The WITNESS: He says, he told me, you know he did not think that the union would be good for the company, and he said that he had heard that me and Dicus, me and Tex were the instigators. I told him that was not true, but that we were going to go along—I made the mistake if I said I was going to go along with the boys, and I told him that, you know, a lot of the companies in Santa Maria were paying real cheap wages, and that they had talked to me about going along with them. That was the fellow employees in different companies. And I told them I was going to go along with them and go with the Union. And he did not say nothing else, I don't think. He turned around and walked back in the office.

Manuel Vasquez also testified that on either October 2 or 3 he had a second conversation with Robert L. McEwan, in the latter's office. Vasquez testified that on this occasion he was in Meador's office and McEwan nodded with his head for him to come in. When he was in McEwan's office McEwan showed him some figures on a pad and told him approximately how much money the Company was going to make in a future period. McEwan then said, "that if the Company made any profit, that the money—the profit the company made would go to paying casual labor during the summer time, because the wages had been so high"—"If we did not join the Union, that the money could be distributed among the employees by having barbeques and picnics and parties and fishing trips."

After his attention was directed to the subject of a bonus by the General Counsel, Vasquez testified that McEwan also said that if the men joined the Union that they would lose the yearly bonus.

It's one of the oddities of this work stoppage that when Vasquez was asked if he went "on strike on October 4" Vasquez replied, "I don't know what you mean—I went out on strike. I reported for work." When he was asked if he worked he answered, in the negative and said that he did not cross the picket line.

When Robert L. McEwan was called as a witness on behalf of the Company he said that he had a converation with Manuel Vasquez between September 21 and October 4 in regard to the Union. His version of the conversation was somewhat different from that furnished by Vasquez. McEwan said he made the statement that if the Union was to come into the Company's organization that the high rate of pay which would be paid to casual labor would take away from the profit situation of the Company. And if there were no profits the Company might not be able to pay Christmas bonuses or furnish the employees with fishing trips, barbeques and picnics. However, he also told him that whether the Union came in or not, if the corporation made a profit that the Company would give Christmas bonuses, fishing trips, barbeques and picnics, etc. In this connection it should be noted that A. J. Smith, the prior owner of the Company had on occasion given picnics, fishing trips or a bonus to the employees. In the short period of time, during which McEwan had owned the Company he had not set up any practice of procedure on bonuses, picnics, barbeques or fishing trips; his conduct of the business had not reached those matters.

Richard Dicus called as a witness by the General Counsel stated that the Company had promised him benefits and threatened reprisals in an attempt to influence him in his voting for a collective-bargaining representative. Dicus testified that on October 2 McEwan called Dicus into his office to talk to Thomas W.

Arruda, who was the labor relations consultant and trial counsel for the Company. Dicus testified that when he was seated Arruda said to him that McEwan had called him in, "to see if we cannot do something about these Union things that are going on, and we would like to know if you could give us some help." Dicus testified that then Arruda looked at some papers on his desk and said that there were five names signed on authorization cards that were eligible to vote in the election. Dicus, assuming that Arruda knew the names of the Union employees then told him that they were David Dicus, David Ponsetta, Robert Vasquez, Manuel Vasquez and himself. Arruda then said that he couldn't see how David Dicus, a summer employee and David Ponsetta who had worked only a few days could be eligible to vote. Then Arruda asked him how he felt about the "Union thing." Dicus said he could take it or leave it. Then Arruda said, "Bob and I have been talking it over, and we're thinking about making you the foreman and giving you a substantial raise in pay." Then Arruda said, "we would like to do something about this Mexican thing around here." Dicus said he would like the raise in pay but he would like to have the Union too, because the benefits of the Union were pretty good. Then Arruda said he was going to have just as good benefits without the Union as he would have with the Union and that Bob McEwan was working on an insurance proposition that Dicus was interested in. According to Dicus, Arruda closed the conversation by saying that he could not fulfill any of these promises, if the Union came, that it would be illegal. As he was leaving the office, Arruda said to Dicus, "well we can depend on you for a no vote, then". Dicus replied in the affirmative.

In the course of his testimony Robert L. McEwan testified that some time in August, Dicus came to him

and said that he was worried about his job, because Mexicans were taking over so much of the moving industry in the area. McEwan told Dicus not to worry, that McEwan was planning on making Dicus, either operation manager or foreman, as soon as he had the operations running smoothly. After the advent of the union organizational campaign, McEwan told Dicus during the first part of September that Arruda, his labor relations counselor had cautioned McEwan that he could not promote Dicus to the position of operations manager or foreman at that time because such a promotion might be considered an unfair labor practice designed to dissipate the Union's representational strength. According to McEwan, Dicus said that he didn't understand that, and asked if he could talk to Mr. Arruda the next time the labor relations consultant was in town. On October 2, Arruda visited the Company and at that time McEwan told Dicus that Arruda was in his office if Dicus wanted to talk to him. Dicus joined Arruda and McEwan in the office and said to Arruda that he understood that Arruda had said that he could not be promoted at that time, and Dicus asked why. Arruda explained that to promote him would be like trying to break the Union or dissipate its majority. Arruda said that the petition said that there were five employees. Dicus said that he knew who the men were who were adherents of the Union and started to name them, but Arruda stopped him saying, "I don't want to know who they are." Then Arruda explained that Dicus had a right to join the Union or to refrain from joining. Dicus replied that he didn't care whether the Union got in or not, but he thought that McEwan and he could sit down and work out an arrangement between themselves. Arruda told Dicus, that if the Union came in and McEwan still wanted to promote him, he could. But he

couldn't do it at that time, because it would look as though he was trying to take away the Union's majority. McEwan denied that Arruda asked Dicus how he was going to vote or that the words vote or voting were mentioned in the course of the conversation at any time. McEwan testified that he was in the office during the entire conversation and several times stopped Dicus from closing the door.

The Alleged Requests for Reinstatement

At the hearing the General Counsel offered proof that, "during the month of October, both Vasquez and Dicus inquired of McEwan as to whether they would have their jobs *at the end of the strike.*" This short passage from the General Counsel's brief is quoted because the actual testimony seems to fall far short of an unconditional offer to call off the strike and an unconditional request for reinstatement. Richard Dicus testified that while McEwan was in the hospital he called at the hospital to see McEwan. In the course of the conversation with McEwan he asked if he was going to have a job or not. McEwan said that he did not know how the strike was going to turn out and he could not say, whether Dicus would have a job or not at that time. After McEwan left the hospital and was back at the warehouse of the Company, Dicus and his wife called on McEwan at the office. Again he, "asked Mr. McEwan if I was going to have a job, and he told me practically the same thing." McEwan said, "I don't know. I don't know how this thing is going to turn out—as far as I'm concerned, it is the principle of the thing." The General Counsel then asked Dicus if he was asking for his job back at that time or "after the strike was over." Dicus replied that at "this particular time I asked him after the strike was over."

Manuel Vasquez also testified that he went to the hospital to see McEwan on a Sunday. He told McEwan that the boys had talked about going back to work and they would like to know how he felt about it. McEwan told Vasquez that physically he was not in a position at that time to talk about their going back to work, that after he got a little better and he felt more like talking, that his door would always be open to any of the men who wanted to talk to him.

Richard Dicus testified further that around December 21, Manny Vasquez and himself went to the office to see if McEwan would give them their jobs back. Manny Vasquez asked McEwan if he would consider giving the men their jobs. McEwan replied that he could not do it. He said that he had men working for him that had stuck with him during his trouble and he just could not fire them to make room for the former employees. He asked them how they would feel if he put them back to work, and two or three weeks later fired them. McEwan said his door was always open to the men, but at that time he could not do it.

In the course of his testimony, McEwan said that at the time the various employees visited him at the hospital he was recovering from major surgery and was under the influence of sedatives; that he simply told the men that he was in no position to discuss anything concerning the operation of the Company at that time.

In addition to the verbal testimony, the General Counsel introduced certain documents which showed the payroll of the Company for weeks immediately prior to and after the initiation of the strike. These records demonstrate that no one worked on either October 4 or 5. From McEwan's testimony which is un-

contracted it is clear that his brother furnished him with 5 men who worked for a short period of time after the beginning of the strike and that thereafter McEwan made do with such men as he could hire in the locality.

It is undisputed that from October 4 until the date of the hearing the strike and picketting at the warehouse continued. On the day before the hearing a final effort was made by employees Vasquez and Dicus to confer with McEwan and settle the strike and arrange for a return of the men to their jobs. McEwan said that he would confer with his attorney on the situation and the employees offered to submit for consideration of McEwan, sample Teamster Contracts from Monterey or Sacramento. However, the hearing previously adjourned, took place as scheduled.

The testimony related above does not purport to be a summary of all testimony and all documentary evidence submitted and received a the hearing; it is merely a summary of the testimony of the principal witnesses for the parties which presents their contentions. All testimony, and all documents have been considered in reaching the conclusions hereafter stated, but some testimony of relatively lesser importance has not been narrated here in the interest of brevity.

CONCLUDING FINDINGS

As the reader must have noted the sequence of events leading to the principal issue here, the work stoppage, is undisputed. This evidence established beyond any possible doubt that the Union organized the employees of the Company, but did *not* demand recognition from the Company, or offer to prove to the Company its majority status by the presentation

of authorization cards or by any other means. The Union first chose to use the procedures of the Board to settle the question of representation, so it duly filed a petition for certification of representative with the Regional Office (Regional Office 31), Los Angeles. This conduct of the Union was in accord with the spirit and the hope of the Congress in passing the National Labor Relations Act, and the various amendments, whose purpose was and is to insure industrial and employment stability and harmonious labor relations conducted in accordance with law by collective bargaining, and not by "quickie" resorts to the use of economic force which the Congress on several occasions had found to be inimical to our national welfare.

However, the Union's reasoned course of action, was soon abandoned and in its place the Union, without demand or notice to the Company, initiated a work stoppage and picketing, and here we reach the crux of this proceeding. Why did the Union abandon the legal procedure of the Board and resort to its "quickie" work stoppage? Ben Sanders, the Union officer in charge of the organizational efforts of the Union testified that this action was taken for two reasons, (1) he had received hearsay information that the Company had *withdrawn* its *consent* to an election and (2) *some other* employers in the area had fired some union adherents. As to (1), the fact is undisputed that the Company had not consented to an election, and had *not* withdrawn any consent or withdrawn any action which could be described as purported consent. The Company, at that point was awaiting further action of the Regional Office in the Union-instituted proceed-

ing. At that point the Union ordered the work stoppage and picketing began.[1]

At this point, in my judgment the question must be raised, was this "quickie work stoppage," a *protected* activity under the Act? I am familiar with the line of cases which appear to hold that *all* concerted work stoppages, except those for a clearly illegal purpose, are protected under the Act, but in my judgment this case arising after 30 years of collective bargaining calls for a re-examination of this so-called blanket protection of work stoppages upon the fiction that they are *legal strikes,* either "economic" or "unfair labor practice" in nature.

To place this question in its proper focus let me say that "quickie strikes" which arise spontaneously because of an unfair labor practice committed by an employer, or because of unsafe, or unsanitary conditions developing on a job are, in my judgment, properly protected by the Board. But, the rationale pro-

[1] In passing it should be stated that in his testimony, Sanders after some leading questions, testified that he received his information concerning the withdrawal of consent from the Union's counsel, George A. Pappy, Esq., in a phone call to Mr. Pappy's office in Los Angeles, and that Mr. Pappy had received the information from "someone" in the Regional Office. I do not credit this testimony of Sanders. Mr. Pappy is an experienced labor counsel, and a former employee of the Regional Office. I have such confidence in Mr. Pappy's ability and integrity and in the ability and integrity of the personnel in the Regional Office, that this testimony proved to be utterly without factual foundation, cannot be credited. In my judgment, this bit of testimony is a fabrication by Sanders to give a semblance of excuse for his arbitrary and precipitate conduct in calling the work stoppage. I do not credit this attempt by Sanders to slough off the responsibility for his conduct on Mr. Pappy or Regional Office personnel.

tecting those strikes may not be stretched to this work stoppage without nullifying the intent of the Congress, in enacting and in amending the Act.

Most of the writers on this subject define a strike as a concerted withholding of their labor by a group of employees to exert economic pressure upon an employer with whom they have a labor dispute. Here, at the time of the work stoppage, there existed no labor dispute; the Union had not notified the Company of its claimed majority representative status; it had not demanded recongition and it had not been refused. At that point, no difference existed between the Union—employees and the Company. The Company waited, expecting the law as administered by the Regional Office to take its course.

At that point the Union called a work stoppage of *this* Company because allegedly (1) some *other* van line in the area had done something which the Union didn't like and (2) for the purpose of muscling its way to representative status by the use of economic force.[4]

I do not believe that such conduct should receive the protection of the Act. Thirty years have passed since the passage of the Wagner Act, but even in that long time, we should not forget that it was a veritable plague of strikes, often caused by arbitrary, unreasoned and unreasoning action by employers and unions, that brought the Wagner Act into being to bring order out of chaos that threatened our national

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[4] I have stated previously that I do not credit the testimony of Sanders as to the alleged withdrawal of consent to an election. In my judgment, the Union, through the Teamster officers, simply decided to abandon the Board's procedure and to muscle their way to representative status by economic force, *without displaying proof* of *majority status* to *either* the *Company* or *the Board.*

existence. Its purpose was to promote harmonious labor relations, and employment stability by the means of collective bargaining and the use of legal procedures, and thus displace the bull-headed intransigence which was the hallmark of many employers and union leaders of that era. Upon a consideration of the causes which brought the Act into being, and the clearly stated Congressional purpose in passing the Act, and its amendments, I cannot see how *this work stoppage* can be found to be a protected activity under the Act.

Support for this position is found in the decision of the Court of Appeals (C.A. 4) and of the Supreme Court in the *Washington Aluminum* case which states and answers the question here presented.[8] In the cited case the employees of Washington Aluminum Co. walked off the job because the place of their employment was in their opinion "too cold." The Circuit Court noted that no notice to strike was given, and no complaint about the cold given to the Company before the strike. The Supreme Court found notice to strike in some individual complaints lodged with supervisors and excused the failure to give notice on the ground that the employees had no bargaining representative,—a deficiency not present here.

The reasoning of the Circuit Court in pertinent part is as follows:

> There was some variation in the testimony of the employees as to the real reason for the walkout. But even if it be assumed their sole purpose was to protest the low temperature of their place of employment we do not believe their actions should be considered a protected

[8] *Washington Aluminum Co.*, 291 Fed. 2nd 869, 48 LRRM 2528; reversed by U.S. Supreme Court 370 U.S. 9, 82 S. Ct. 1099, 50 LRRM 2235.

activity under the facts and circumstances here presented. One of the fundamental policies of the National Labor Relations Act, 29 U.S.C. § 151 (1958), is to secure industrial peace and prevent strife and disruption by encouraging negotiation and peaceful procedure for the attempted settlement of the demands of a party. That is not to say that employees may not under any circumstances, exert concerted pressure on their employer in their efforts to gain compliance with their demands. However, the office of a demand as a condition upon the use of concerted pressures is well recognized. As this court stated in Jeffery-De Witt Insulator Co. v. NLRB, 91 F.2d 134, 138, 1 LRRM 634 (4th Cir. 1937):

"* * * A 'strike' in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer * * *

The decision then cites *N.L.R.B.* v. *Ford Radio and Mica Corp.*, 258 Fed. 2nd 165, 42 LRRM 2620 (2nd Circ. 1958) to the following effect:

In NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 465, 42 LRRM 2620 (2nd Cir. 1958), the court said:

"The duty to bargain collectively is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful

settlement of labor disputes. Placing the activity here under the broad protection of section 7 would clearly frustrate that purpose. To hold that those engaging in a strike had an unfettered right to refuse not only to discuss their grievances but even to name them would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations. 'The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right to collective bargaining for the purpose of preserving industrial peace.* * *'

"We do not hold as a matter of law that employees engaging in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged."

We believe this principle particularly applicable where, as here, the cause of the objectionable condition was largely fortuitous and substantially beyond the control of the employer and was of but brief duration, and where, even beyond the neglected opportunity for inquiry, negotiation and settlement, effective measures had been taken by the employer before the protest was even staged. The company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees.

The Supreme Court, Mr. Justice Black writing, reversed the Circuit Court on the following reasoning:

> We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the niggardly fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. *The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative* and, in fact no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the

same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. *Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion* in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding *that they were not required to make any more specific demand than they did* to be entitled to the protection of § 7. [Emphasis in decision supplied by writer].

Upon a consideration of the lines of legal reasoning in these decisions I must hold that the Union-ordered work stoppage of October 4 was an unprotected activity. Here there was no spontaneous work stoppage and the men were represented by a collective-bargaining agent—a local of a national union. However, the collective-bargaining agent chose to proceed by the use of economic force, and acted in absolute derogation of the Act, which it had previously invoked; because of its displeasure with some other employer in the Santa Maria area.

However, the General Counsel contends that the Union's action of October 4 was a protected unfair

labor strike. It is not clear from her argument, what action of the Company was an unfair labor practice which caused or prolonged this alleged strike, and as I view the evidence there can be no doubt as to why this work stoppage occurred and why it has continued until the date of the hearing. On that point we have the questionable testimony of Sanders himself and the testimony of McEwan, which I credit, to the effect that the Company took no action against the Union or its adherents prior to the stoppage. I have examined the Company's conduct from every angle and I can perceive no element of unfair labor practice which caused or prolonged the work stoppage.

At best, for the General Counsel's purposes, this strike could be only an economic strike for the purpose of gaining recognition of representative status from—the Company. I recognize the fact that the Board may rationalize that transmittal of a copy of the Union's petition to the Company was by inference a demand for recognition and when the Company did not recognize the Union immediately, the Union's strike action was justified. Of course, such a finding would disregard those factors in the evidence previously enumerated, but in case that point may be reached by the Board, I will determine the rights of the so-called strikers to reinstatement.

On October 5, the Company sent Manuel Vasquez, Robert Vasquez, and Richard Dicus a telegram stating that "for failure to report for work as directed at 7 a.m. Wednesday, October 4, 1967 you are being permanently replaced." The testimony of McEwan which is uncontradicted and which I credit, establishes that on October 4, *he made arrangements with his brother for replacements of temporary duration and that hereafter he hired such men as the circumstance of the strike and the labor market afforded as permanent*

replacements. It has been held for many years on the highest authority that an employer has the right to replace economic strikers and continue his business despite the strike if he can.[6] Therefore, I find that the action of the Company in replacing the economic strikers was not a discriminatory discharge as alleged in the complaint and was not an unfair labor practice.

At this point we may turn to a consideration of the rights of the replaced economic strikers to reinstatement to their jobs. Here, it is undisputed that the strike which began on October 4, 1967 continued until the date of the hearing on April 3, 4 and 11, 1968. The testimony of the employees themselves is clear on the question of reinstatement rights. Their first worry about their jobs was couched in the question, would they get their jobs back, *after the strike was over.* Up to the day before the hearing the employees, with the Union officials in the background, sought to induce McEwan to enter into a version of the Teamster contract *and* to reemploy the strikers. The law is clear on this point; if economic strikers call off or abandon their strike, and if they make an unconditional offer to return to work, they have a right to be reinstated in their former or equivalent positions, *if* the employer has not hired permanent replacements for the strikers or *if* the employer has an equivalent job open.

In this case, none of these conditions to reinstatement were ever fulfilled by the strikers, and the proof offered by the General Counsel is fatally defective, in that this transcript does not disclose that the Company had vacant jobs to which the strikers could have been reinstated. To enumerate these deficiencies; (1) the strikers never abandoned or called off their strike, but on the contrary continued it; (2) they made no

[6] *Mackay Radio and Telegraph Co., Inc.* 304 U.S. 333.

unconditional offer to return to work; (3) they had been permanently replaced and (4) there is no proof in this record that there were equivalent jobs open which could have been given to the strikers. Therefore, I find that the failure of the Company to reinstate the strikers was not an unfair labor practice as alleged in the complaint.

The complaint herein alleges that the Company violated Section 8(a)(1) of the Act, by specific conversations of certain individuals. One of these is Johnny McEwan, son of one of the stockholders of the Company. It is undisputed that this teenage college boy was a summer helper at the Company as was his friend, David Dicus, another college student. Johnny McEwan is the son of one of the owners of the Company and David Dicus is the son of Richard Dicus, a leading union adherent. These part-time, casual, summer-time employees are involved in this controversy, only by the accident of birth and filial loyalty. According to David Dicus, Johnny McEwan offered the opinion to his friend David that Johnny's father would work the men so hard they would quit. On another occasion as they sanded David's "hot rod," Johnny reiterated this statement. I do not think this expressed opinion of one college boy to his chum; both of whom are known to the employees as "helpers" of summer-time duration only, constitutes an unfair labor practice on the part of this Company. The General Counsel's claim that this opinion of Johnny McEwan binds the Company, based only on his relationship to his father, is, in reality an admission of just how insubstantial is the General Counsel's case.

There are other conversations alleged in the complaint to be violations of Section 8(a)(1) of the Act.

They involve a conflict in testimony between McEwan and employees Dicus and Vasquez. The differences in the testimony of the witnesses as to these conversations goes largely to their timing and the factual context in which the conversations occurred. Upon a consideration of all the evidence and the bearing and demeanor of these witnesses, I credit the versions of these conversations given by McEwan. His version of these conversations seems to be more consistent with the totality of the evidence and the undisputed sequence of events from the time the Company acquired the business from its former owner, until the time of the hearing. Furthermore, I can perceive no threat of force or economic reprisal in these conversations.

Therefore I find that the Company did not violate Section 8(a)(1) of the Act as alleged in the complaint.[7]

Upon a consideration of all the credible testimony and documents submitted in the case it is found that the General Counsel has failed to prove by a preponderance of the credible evidence that the Company committed any of the unfair labor practices alleged in the complaint, therefore it is ordered that the complaint herein is dismissed in its entirety.

Dated: February 20, 1968.

DAVID F. DOYLE,
Trial Examiner.

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[7] Dierks Forests, Inc., (C.A. 8) 66 LRRM; 2581, 385 F.2d 48, and cases cited; *TRW-Semi-Conductors, Inc.*, 66 LRRM 2707; 385 F.2d 753.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-895

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL VAN LINES,

Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

International Van Lines (hereinafter referred to as Respondent) hereby answers the Petition of the National Labor Relations Board (hereinafter referred to as the "Board") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Solicitor General filed a Petition for Certiorari in this case on behalf of the Board on January 10, 1972.

Opinions Below.

The opinion of the Court of Appeals (App. A, pp. 15-31)[1] is officially reported at 448 F.2d 905. The opinion of the Board (App. D, pp. 34-83) is reported at 177 NLRB 353.

[1]For the convenience of the Court and in order to avoid duplication of the record, references to proceedings below are keyed to the Board's Petition for Certiorari. The term "App." shall refer to the Appendices to the Petition filed with this Court heretofore by the National Labor Relations Board.

Jurisdiction.

The judgment of the Court of Appeals (App. B, p. 32) was entered on September 3, 1971. The Board's Petition for Rehearing *en banc* was denied on October 12, 1971 (App. C, p. 33). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

In addition to the question presented by the Board's Petition to this Court, Respondent respectfully submits the following additional question:

Whether the protections of Section 7 of the National Labor Relations Act, as amended (hereinafter referred to as the "Act") (16 Stat. 136, 73 Stat. 519, U.S.C. Sections 151, *et seq.*), apply to strike activities of employees who without notice, strike their employer to compel recognition of a labor organization whose petition for representation, at the very time of the commencement of such strike, is under investigation and is being processed by the Board pursuant to its authority under Section 9 of the Act.

Statute Involved.

The relevant provisions of the Act (*supra*) are as follows:

"SEC. 8. (a). It shall be an unfair labor practice for an employer—

* * *

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be pro-

hibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

"SEC. 9 (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has a reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Statement.

A. The Board's Findings of Fact.

In late August, 1967, Teamsters Local 381 (hereinafter referred to as the "Union") commenced efforts to organize employees working for moving and storage companies, including Respondent, located in and around Santa Maria, California (App. D, pp. 36, 54). Although the Union's organizational activities were directed toward numerous employers, each employer was organized as a separate bargaining unit (App. D, pp. 54, 55).

A few days after the filing with the Board of a representation petition and service thereof on Respondent, the Union held meetings with the employees of the various moving and storage companies and a strike was initiated against Respondent and others on October 4, 1967 (App. D, pp. 36, 59). The purpose of the strike, as found by the Board, was either (1) to bring pressure on Respondent to agree to a consent election or (2) to bring pressure on Respondent to immediately recognize the Union (App. D, p. 39).

When Robert McEwan, Respondent's President, arrived at his place of business on the morning of October 4, 1967, he observed two pickets, neither of whom were employees of Respondent. Four of Respondent's employees who were across the street [App. D, pp. 58-60; Tr. 326-327] refused to come to work, saying to McEwan,

> "* * * we don't have a contract. We cannot cross the picket line." (App. D, p. 61).

On October 5, 1967, Respondent hired five employees who had been laid off by Mercury Van & Storage, a company operated by McEwan's brother in Oxnard, California, to handle a job originally scheduled for the previous day. The men were carried on the Mercury payroll until October 11, 1967 with the understanding that Respondent would reimburse Mercury for wages paid on its behalf [App. D, p. 61; Tr. 329-331, 348-351].

Also, on October 5, 1967, Respondent notified employees Manuel and Robert Vasquez and Richard Dicus by telegram that: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967, you are being permanently replaced" (App. D, pp. 36-37).

Following the commencement of the strike and Respondent's October 5 telegram, Richard Dicus and Manuel Vasquez inquired of McEwan as to whether they would have their jobs at the end of the strike. The inquiries were made during October; however, no commitments were made by either McEwan or the employees [App. D, p. 69; Tr. 79-80].

In late November, 1967, Salvidore Casillas, a casual employee of Respondent who had declined to cross the October 4 picket line, asked McEwan to place him on Respondents "availability list" [App. D, p. 37; Tr. 343-344]. On or about December 12, 1967, Richard Dicus, Manuel and Robert Vasquez requested reinstatement by Respondent [Tr. 182-184].

On or about March 28 and 29, 1968, Manuel Vasquez visited McEwan and told him that if he would

sign a contract and put all the men back to work the strike could be settled. McEwan refused to sign the contract presented to him by Vasquez [Tr. 247-248, 249, 252, 258-259]. None of the above named employees were recalled by Respondent.

B. The Board's Decision and Order Before the Court.

The Board found that Respondent's employees who refused to report for work on October 4 had engaged in strike activity protected by Section 7 of the Act; that on October 4, 1967, said employees were economic strikers; that on October 5, 1967, said employees were discharged by Respondent "for not working, *i.e.*, for engaging in a strike", and Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act; that said discharges had the natural effect of prolonging the strike and thereby converted the economic strike into an unfair labor practice strike; that accordingly Respondent further violated Sections 8(a)(1) and (3) of the Act by refusing to reinstate Manual and Robert Vasquez, Richard Dicus and Sal Casillas upon their unconditional applications therefor; and that on October 5, 1967, the Union represented a majority of Respondent's employees in an appropriate bargaining unit (App. D, pp. 39-42)." The Board thereupon ordered Respondent to reinstate the four named employees and to make them whole for any loss of pay resulting from the Respondent's unlawful action from the date of their unconditional applications for reinstatement. (App. D, p. 42).

BASIS FOR THE WRIT.

(1) The Court of Appeals affirmed the Board's findings that Respondent's conduct in sending the telegram of October 5, 1967, before said employees had been permanently replaced, was in violation of Sections 8(a)(1) and (3) of the Act (App. A, p. 22). That Court, nevertheless declined to accept the Board's view that as a matter of law the aforesaid violation of the Act changed the status of those economic strikers to that of unfair labor practice strikers (App. A, pp. 26-27).

The reasoning of the Court below is set forth in a footnote to its discussion of that issue (App. A, pp. 27-28). That footnote has been omitted from the Board's extract of the Court's opinion, which appears on pages 8 and 9 of its Petition (App. A, pp. 27-28).

In essence, the Court of Appeals reasoned that the transition from economic to unfair labor practice striker occurs "only in those cases where the discharge of economic strikers constitutes a significant factor in the prolongation of the strike" (App. A. p. 27, note 5); and in this case, although the Board has made a finding to that effect, such finding is in the nature of a conclusion, which is unsupported by any evidence (App. A, p. 28). Accordingly, in the absence of a finding supported by substantial evidence that the discharge of economic strikers in violation of the Act, was a significant factor in prolonging the strike, the Court of Appeals held that the status of the discharged employees remained that of economic strikers (App. A, p. 28).[3]

[3]See *NLRB v. James Thompson & Co.*, 208 F. 2d 743 (C.A. 2, 1953), where the employer committed unfair labor practices

(This footnote is continued on next page)

(2) Notwithstanding the disagreement between the Court of Appeals and the Board as to whether the discharged employees have the reinstatement rights of economic or unfair labor practice strikers (the issue which the Board asks this Court to review), both the Board and the Court below were in agreement that the October 4, 1967 strike, or refusal to report to work, was concerted activity protected by Section 7 of the Act. It is that question to which Respondent will now address itself.

The decision of the Court below affirmed the finding by the Board that a strike to persuade an employer to consent to an election is concerted activity protected by Section 7 of the Act, notwithstanding the fact that the strike is called on the heels of the filing by the Union of a petition for a Board conducted election (App. A, p. 24). The Court did not pass upon the Board's alternative finding that "even if the purpose of the strike was to gain immediate recognition for the Union, rather than to merely force a consent election,

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following the commencement of a strike that was economic at its inception. The Court there denied enforcement of a Board order calling for reinstatement and back pay for employees it classified as unfair labor practice strikers. Judge L. Hand, speaking for the Court, said at page 749:

> "It is indeed theoretically possible that the subsequent practices might have prolonged the strike although respondent was not guilty for refusing recognition of the union; but there is not one syllable in the record that any one of the eleven supposed unfair practices (thirteen less two) kept it going a day longer than the refusal to deal with the union did. That was the grievance on which the employees went out, and there is not the least likelihood that, as soon as the respondent should have changed its position on that, the strikers would not have returned at once regardless of anything else that had happened after October fourth."

See also *NLRB v. Frick Company*, 397 F. 2d 956 (C.A. 3, 1968).

the strike was lawful, even absent a prior demand for recognition . . ." (App. A, p. 24, note 4). In failing to pass upon the "recognition" issue, the Court below, at the very least, created further uncertainty in an already uncertain but critical area of labor law. More likely, however, the decision of the Court of Appeals concurring in the overall finding that the strike was protected activity, will be cited for that proposition alone by the Board, future parties and commentators, as judicial approval of the Board's rationale on the recognition issue.

If either of the objectives of the strike (consent or recognition) were unlawful, then the strike itself must be so characterized. The analogy to be drawn from the secondary boycott cases (*NLRB v. Denver Bldg. Trades Council*, 1951, 341 U.S. 675) supports this conclusion. Furthermore, there is no way from a reading of the Board's decision to limit that decision to the consent issue. On the contrary, the Board has embraced both objectives and has declared them to be equally protected by Section 7 of the Act. (App. D, pp. 39-40). In support of its position, the Board cites *Philanz Oldsmobile Inc.*, 137 NLRB 867, 969; and *New Orleans Roosevelt Corp.*, 132 NLRB 248. Neither case is in point on the recognition issue. Both cases deal with picketing to persuade an employer to consent to an election. Neither the Court of Appeals nor the Board below cite any authority in support of the Board's position on the recognition issue.

To sanction the strike as protected activity in the instant case is to encourage the use of economic muscle by a union in derogation of the procedures provided by Congress to determine the collective bargaining representative status.

The right of employees to strike, however fundamental, is not unbridled. The so-called sitdown strike, where strikers remain on the employer's premises during the strike, taking possession of his property and excluding others from entry, has been condemned. *NLRB v. Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240.

A strike conducted by a minority of a bargaining unit without authorization of the majority has been held to be activity not protected by Section 7 of the Act. *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805 v. NLRB*, 312 F. 2d 108 (C.A. 2, 1963).

Strikers guilty of violence have never been accorded the protections of the Act. *NLRB v. Fansteel Metallurgical Corp., supra.*

Employees who refuse to work overtime or to perform certain tasks while accepting others in order to bring economic pressure on their employer to force him to accede to their demands have been denied the protections of the Act. *NLRB v. Valley City Furniture Co.*, 1954, 110 NLRB 1589, *enforcing*, 230 F.2d 947 (C.A. 6, 1956); *Montgomery Ward & Co.*, 1945, 64 NLRB 432, *enforcement denied*, 157 F. 2d 486 (C.A. 8, 1946).

In *American News Co., Inc.*, 1944, 55 NLRB 1302, the Board, after some prodding by this Court in *Southern Steamship Co. v. NLRB*, 1942, 316 U.S. 31, 47 that a strike to compel an employer to violate the Federal Stabilization Act of 1942, was not concerted activity protected by Section 7 of the Act, and recognized the principle that:

> "* * * the Board has not been commissioned to effectuate the policies of the Labor Relations

> Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In *Thompson Products, Inc.*, 1947, 72 NLRB 886, the Board extended the *American News Co., Inc., supra,* reasoning and held that a strike by employees to compel their employer to violate the Board certification of another union was conduct not protected by the Act.

In his dissent to this Court's opinion in *United Mine Workers v. Arkansas Oak Floor Co.*, 1956, 351 U.S. 62, which set aside a ruling of a Louisiana State Court enjoining peaceful recognitional picketing by a union which had failed to file with the Secretary of Labor the financial and other data required by Sections 9(f) and (g) of the Act, and had failed to file with the Board the non-Communist affidavits required by Section 9(h), Justice Frankfurter noted that:

> "A noncomplying union, such as the petitioner, however vigorously it may assert noncompliance as a matter of principle, is not under condemnation of illegality by the Taft-Hartley Act, or any other federal law, from employing economic pressure to achieve its goal. *The explicit consequence which that Act attaches to noncompliance is that such a union is denied the advantages of the National Labor Relations Board; it cannot utilize that Board's machinery to obtain certification as the*

bargaining representative or to secure redress against unfair labor practices by an employer." (emphasis supplied).

In the instant case, Respondent does not question the right to strike under the attendant circumstances. Respondent's contention, simply stated, is that if a union and the employees supporting it, after petitioning the Board for an election, choose to disregard the Board's processes and rely upon the strike as a means to gain recognition, they should not be allowed thereafter to use the Board's processes to seek redress from conduct of the employer which was the proximate result of their acts in derogation of the Board's election process.

The Board in its decision in this case relied heavily on the opinion of this Court in *NLRB v. Washington Aluminum*, 1962, 370 U.S. 9, as support for its broad application of Section 7 to the concerted activities in question (App. D, p. 40). The Trial Examiner's analysis of *NLRB v. Washington Aluminum, supra,* with which Respondent concurs, distinguishes that case from the instant case based upon the absence of a bargaining representative *Washington Aluminum* (App. D, pp. 78-79). The spontaneous work stoppage in *Washington Aluminum* was engaged in by seven employees who were wholly unorganized. The Court said at 370 U.S. 9, 10:

> "Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the Company, the men took the most direct course to let the company know that they wanted a warmer place to work."

A spontaneous work stoppage by unrepresented employees to protest a grievance over working conditions

is a far cry from a strike, called without notice or demand, to force an employer to forego election procedures established by Federal law. The Trial Examiner's comments on this point are worthy of consideration.

> "I do not believe that such conduct should receive the protection of the Act. Thirty years have passed since the passage of the Wagner Act, but even in that long time, we should not forget that it was a veritable plague of strikes, often caused by arbitrary, unreasoned and unreasoning action by employers and unions, that brought the Wagner Act into being to bring order out of chaos that threatened our national existence. Its purpose was to promote harmonious labor relations, and employment stability by the means of collective bargaining and the use of legal procedures, and thus displace the bull-headed intransigence which was the hallmark of many employers and union leaders of that era. Upon a consideration of the causes which brought the Act into being, and the clearly stated Congressional purpose in passing the Act, and its amendments, I cannot see how *this work stoppage* can be found to be a protected activity under the Act." (App. D, pp. 74-75).

This Court, in *Boys Market, Inc. v. Retail Clerks*, 1970, 398 U.S. 235, speaking through Justice Brennan, recognized the transition that has occurred in labor-management relations during the thirty-odd years since the enactment of the Norris-LaGuardia Act, 47 Stat. 70 (1932), and the Wagner Act, 49 Stat. 449 (1935, as amended, 29 U.S.C. 151, *et seq.*) and stated at 238:

> "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor

movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones."

The *Boy's Market* decision reversed *Sinclair Refining Co. v. Atkinson*, 1962, 370 U.S. 195, and reflected a national labor policy which favors judicial enforcement by injunction of contractual provisions for resolution of disputes by arbitration with a collateral no strike clause, as opposed to the prior concept that the right to engage in peaceful picketing is inviolate.

The same policy considerations upon which the reversal of *Sinclair* was predicated should apply with equal force to the case at bench. The protections embodied in Section 7 of the Act should not embrace employees who strike their employer to compel recognition of a labor organization whose petition for representation is pending before the Board pursuant to its authority under Section 9 of the Act.

If permitted to stand, the combined effect of the decisions of the Court and Board below will be an open invitation to employees and unions to disregard the orderly processes of the Board in the most critical area—determination of a collective bargaining representative—and to resort to the strike at the very time the Board is investigating the basis for the petition for representation. Should the Board's decision in this respect be left undisturbed, employers will be faced with

the choice, in many cases, of suffering the economic loss attendant to a prolonged strike, or to avoid such loss, of recognizing a union which may not in truth or fact represent a majority of the employees in an appropriate bargaining unit. This latter course of action, which, on the one hand may be the only practical alternative, on the other hand will constitute a violation by the employer of Section 8(a)(2) of the Act, as an incursion against the employees' freedom of choice guaranteed by Section 7 of the Act. *Empire State Sugar Co. v. NLRB*, 401 F. 2d 559 (C.A. 1, 1968); *NLRB v. Midtown Service Co.*, 425 F. 2d 665 (C.A. 2, 1970).

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted as to the question presented by Respondent and denied as to the question presented by the Board.

Respectfully submitted,

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Attorney for Respondent.

Of Counsel:

GOLDSTEIN, GENTILE & KIRSHMAN,

the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-895

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent has filed an "Answer" which, in addition to opposing the petition for a writ of certiorari, raises another issue: whether employees who strike to compel their employer to recognize a union while a petition to determine its representative status is pending before the Board are entitled to the protection of Section 7 of the National Labor Relations Act (pp. 13-15).

It is unclear whether respondent intends this document to be a cross-petition for a writ of certiorari.

Since the court of appeals decided this issue against the respondent, it could raise the point only by itself filing such a cross-petition and not in its answer to the Board's petition. See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431-432; *Alaska Industrial Board* v. *Chugach Ass'n*, 356 U.S. 320, 325; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191; *LeTulle* v. *Scofield*, 308 U.S. 415, 421-422. If the answer be viewed as a cross-petition, it is untimely. It was filed on February 7, 1972. This was 157 days after September 3, 1971, when the judgment of the court of appeals was entered, and 118 days after October 12, 1971, when the court denied the Board's petition for rehearing (which did not involve the issue which respondent seeks to raise). No extension of time for filing a cross-petition was obtained, and the Answer was filed long after the 90-day period for petitioning prescribed in 28 U.S.C. 2101(c) expired.

In any event, the issue respondent seeks to raise is not presented on the record. For the court of appeals held that the purpose of the strike was not, as respondent contends, to compel the employer to recognize the union, but "to pressure the Company into holding a consent election" (Pet. App. 23).

Accordingly, the Court should grant the petition limited to the question presented by the Board.

Respectfully submitted.

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Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1972.

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